BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

ROBERT "BOB" BURNS – Chairman
BOYD DUNN
SANDRA D. KENNEDY
JUSTIN OLSON
LEA MÁRQUEZ PETERSON

In the Matter of: BAIC, Inc., a Texas for-profit corporation, SoBell Corp, a Mississippi for-profit corporation, Andrew Gamber, an Arkansas resident, Mark Corbett, a California resident, Upstate Law Group, LLC, a South Carolina limited liability company, Candy Kern-Fuller, a South Carolina resident, Smith & Cox, LLC (CRD #149088), an Arizona limited liability company, William Andrew Smith (CRD #5638821) and Kimberly Ann Smith, husband and wife, Christopher Spence Cox (CRD #5639015) and Beth Cox, husband and wife, Respondents.	DOCKET NO. S-21044A-18-0071 DECISION NO. **77747** **OPINION AND ORDER**

DATE OF HEARING: June 17, 21, 24, 25, 26, and 27, 2019

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Brian D. Schneider

APPEARANCES: Mr. Mark D. Chester, LAW OFFICES OF MARK D. CHESTER, P.C., on behalf of Respondents; and

Mr. Jamie Burgess and Ms. Margaret Lindsey, Staff Attorneys, on behalf of the Securities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

This matter involves Respondents' sale of U.S. military veterans' retirement and disability benefits payments to investors in exchange for a discounted lump sum payment ("income stream investments"). The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") alleges that the income stream investments are unregistered securities and are prohibited by federal law. The Division further alleges that Respondents misled investors as to the security of the income stream investments, failed to disclose to investors multiple cease and desist orders and consent orders against one of the principals involved, failed to disclose to investors that Respondent Smith was subject to a federal tax lien for unpaid taxes, and failed to disclose that Respondent Smith has not paid a 2006 judgment against him. The Division asks for revocation of Respondents' investment adviser licenses, restitution, and administrative penalties.

The Smith & Cox Respondents[1] argue that the income stream investments are not securities and, therefore, they did not violate the Arizona Securities Act. The Smith & Cox Respondents further argue that they made no material misrepresentations or omissions to investors. The Smith & Cox Respondents ask that the Division's request for restitution and administrative penalties be denied or significantly reduced.

DISCUSSION

I. Procedural History

On March 30, 2018, the Division filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, Order of Revocation and Order for Other Affirmative Action ("Notice") against BAIC, Inc. ("BAIC"); SoBell Corp ("SoBell"); Andrew Gamber ("Gamber"); Mark Corbett ("Corbett"); Upstate Law Group, LLC ("Upstate") and Candy Kern-Fuller ("Kern-Fuller") (collectively "Upstate Respondents"); Smith & Cox, LLC ("Smith & Cox"), William Andrew Smith ("Respondent Smith"), and Christopher Spence Cox ("Cox") (collectively "Smith & Cox Respondents"), (all of whom shall be collectively referred to as "Respondents"). The Division alleges that BAIC, SoBell, Gamber, Corbett, Upstate, Kern-Fuller,

[1] Smith & Cox, LLC, William Andrew Smith, and Christopher Spence Cox.

Smith & Cox, and Respondent Smith have engaged in acts, practices, and transactions that constitute violations of A.R.S. §§ 44-1801, *et seq*., the Arizona Securities Act ("Securities Act"). The Division also alleges that Smith & Cox and Respondent Smith have engaged in acts, practices, and transactions that constitute violations of A.R.S. §§ 44-3101, *et seq*., the Arizona Investment Management Act ("IM Act"). Further, the Division alleges that Gamber is a person controlling BAIC and SoBell; Kern-Fuller is a person controlling Upstate; and Respondent Smith and Cox are persons controlling Smith & Cox within the meaning of A.R.S. § 44-1999 so that they are jointly and severally liable to the same extent as BAIC, SoBell, Upstate and Smith & Cox for violations of the antifraud provisions of the Securities Act. Respondents Kimberly Ann Smith and Beth Cox were joined in the action solely for the purpose of determining the liability of the marital community pursuant to A.R.S. § 44-2031(C).

On April 13, 2018, the Smith & Cox Respondents filed a Request for Hearing pursuant to Arizona Administrative Code ("A.A.C.") R14-4-306.

On April 30, 2018, the Upstate Respondents filed a Request for Hearing.

On May 1, 2018, by Procedural Order, a pre-hearing conference was scheduled for May 11, 2018.

On May 2, 2018, the Smith & Cox Respondents filed an Answer.

On May 8, 2018, the Division filed its Motion for Order Requiring the Smith & Cox Respondents to File an Amended Answer that Complies with R14-4-305 ("Motion for Amended Answer") and its Joint Motion for Extension of Time for Respondents Upstate and Candy Kern-Fuller to File Their Answer ("Joint Motion").

On May 11, 2018, the pre-hearing conference was held as scheduled. The Division and the Smith & Cox Respondents appeared through counsel. Kern-Fuller appeared *pro per* and on behalf of Upstate. The Motion for Amended Answer, the Joint Motion and the scheduling of a hearing were discussed.

On May 18, 2018, by Procedural Order, a hearing was scheduled to commence on January 7, 2019, and other procedural deadlines were set.

On May 23, 2018, the Smith & Cox Respondents filed an Amended Answer and a Response to Motion for Order Requiring the Smith & Cox Respondents to File an Amended Answer that Complies with R14-4-305.

On June 5, 2018, the Upstate Respondents filed an Answer, a Request for Hearing and Prehearing Conference, and Consent to Email Service.

On November 20, 2018, by Procedural Order, the hearing was rescheduled to commence on January 8, 2019.

Also on November 20, 2018, the Upstate Respondents filed their List of Witnesses and Exhibits.

On December 17, 2018, the Division filed its Motion for Prehearing Conference and to Vacate Hearing Dates.

On December 18, 2018, by Procedural Order, a pre-hearing conference was scheduled for December 20, 2018.

On December 19, 2018, the Division filed its Motion for Leave to Present Telephonic Testimony.

On December 20, 2018, the pre-hearing conference was held as scheduled. The Division, the Upstate Respondents, and the Smith & Cox Respondents appeared through counsel. The Division's Motion for Leave to Present Telephonic Testimony and the rescheduling of the hearing were discussed.

On December 26, 2018, by Procedural Order, the hearing scheduled to commence on January 8, 2019, was vacated.

On January 2, 2019, by Procedural Order, a telephonic status conference was scheduled for January 8, 2019.

On January 8, 2019, the telephonic status conference was held as scheduled. The Division, the Upstate Respondents, and the Smith & Cox Respondents appeared through counsel. The scheduling of a hearing was discussed.

Also on January 8, 2019, by Procedural Order, the hearing was scheduled to commence on June 17, 2019.

On February 26, 2019, the Division filed a proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties and Order for Other Affirmative Action ("Proposed Order") against BAIC, SoBell, Gamber and Corbett to be heard at the March Open Meeting.[2]

On April 9, 2019, Corbett filed an Answer.

Also on April 9, 2019, the Division filed a Proposed Order against BAIC, SoBell, and Gamber to be heard at the April Open Meeting.

On April 26, 2019, the Commission issued Decision No. 77156, which resolves all issues as to BAIC, SoBell, and Gamber in this matter.

On May 24, 2019, the Division and the Upstate Respondents filed a Joint Motion to Dismiss Claims against Respondents Upstate Law Group, LLC and Candy-Kern-Fuller without Prejudice ("Joint Motion II").

On May 29, 2019, by Procedural Order, the Joint Motion II was granted, and the hearing remained scheduled to commence on June 17, 2019.[3]

On June 14, 2019, the Smith and Cox Respondents filed a Motion to Continue Hearing ("Motion to Continue"), stating Respondents received a large volume of new hearing exhibits from the Division and needed additional time to review them in preparation for the hearing.

On June 17, 2019, the hearing was held as scheduled. The Smith & Cox Respondents and the Division appeared through counsel. Corbett did not appear. The Smith & Cox Respondents' Motion to Continue was discussed, and the parties stipulated to continuing the hearing.

On June 17, 2019, by Procedural Order, the Motion to Continue was granted and the hearing was rescheduled to commence on June 21, 2019.

On June 18, 2019, the Division filed a Notice of New Address for Corbett.

On June 21, 2019, and on June 24, 2019, through June 27, 2019, the hearing was held as scheduled. The Smith & Cox Respondents and the Division appeared through counsel. Corbett did not appear. At the end of the proceeding, the matter was taken under advisement pending the submission of closing briefs.

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[2] The matter was subsequently pulled from the March Open Meeting Agenda.

[3] Corbett, Smith & Cox, Respondent Smith, and Cox are collectively referred to as "Respondents."

On July 1, 2019, by Procedural Order, a briefing schedule was issued.

On September 23, 2019, the Division filed a Motion to Extend Time to File Post-Hearing Brief.

On September 24, 2019, by Procedural Order, the Division's Motion to Extend Time to File Post-Hearing Brief was granted.

On September 27, 2019, the Division filed its Opening Post-Hearing Brief.

On December 2, 2019, the Smith & Cox Respondents filed a Motion to Extend Time to File Response Brief.

On December 5, 2019, by Procedural Order, the Smith & Cox Respondents' Motion to Extend Time to File Response Brief was granted.

On December 10, 2019, the Smith & Cox Respondents filed a Second Motion to Extend Time to File Response Brief.

On December 11, 2019, by Procedural Order, the Smith & Cox Respondents' Second Motion to Extend Time to File Response Brief was granted.

On December 23, 2019, the Smith & Cox Respondents filed a Response Brief.

On January 27, 2020, the Division filed its Reply to Response Brief of Respondents Smith and Cox.

On March 9, 2020, the Division filed its Notice of Errata Regarding its Reply Brief.

II. Structure of the Income Stream Investments

Respondents offered and sold income producing options to potential investors that they categorized into 3 "Buckets." Bucket 1 included income stream investments, Bucket 2 included a fixed insurance annuity, and Bucket 3 included a managed account/REIT. The income stream investments of Bucket 1 are at issue in this matter.

The income stream investments consist of a product wherein a veteran receiving an income stream from a military retirement pension or disability benefits appointed BAIC or SoBell as his or her agent to sell part of the future payments from the pension or disability benefits in exchange for a discounted lump sum payment. Respondents matched an investor to purchase the veteran's pension or disability benefit payments for a specific term and a specified rate of return. The buyer (investor) and the seller (veteran) entered into a Contract for Sale of Payments which provided for the seller to direct

his monthly payment into an escrow account maintained by Upstate, who then distributed the monthly payment to the buyer. If the seller defaulted and stopped directing his or her monthly payment into Upstate's escrow account, after 90 days Performance Arbitrage Company ("PAC") would take over the payments to the buyer through the remainder of the investment.

III. Testimony

A. Elliott Smith[4]

Mr. Smith testified that he is a compliance consultant with investment advisory firms, and that he began doing consulting work for Smith & Cox in July 2009.[5] Mr. Smith testified that, while he primarily assisted Smith & Cox with its disclosure updates, he was asked to review and research the income stream investments.[6]

Mr. Smith testified that he educated himself about the income stream investments and discovered a Securities and Exchange Commission ("SEC") Alert issued in May 2013 titled "Pension or Settlement Income Streams" ("SEC Alert").[7] Mr. Smith testified that on August 21, 2013, he emailed a copy of the SEC Alert to Respondent Smith and Cox and that he advised them to read the SEC Alert to understand the risks and issues before proceeding with selling the income stream investments.[8]

Mr. Smith testified that the SEC Alert states that "Federal law may restrict or prohibit retirees from 'assigning' their pension to someone else" and that it provides the United States Code citations addressing the assignability of pension benefits, including provisions governing military benefits, civil service benefits, and private pension benefits.[9] Mr. Smith testified that the SEC Alert advises potential investors to check the reputation of the company offering the lump sum and to research the firm on the internet and with a financial professional.[10] Mr. Smith further testified that he discussed with Respondent Smith and Cox that as part of due diligence it is necessary to understand not just the product

[4] Elliott Smith is referred to as "Mr. Smith." William Andrew Smith is referred to as "Respondent Smith."
[5] Tr. 59:8-10; Tr. 61:15-22.
[6] Tr. 62:5-12; Tr. 63:11-17; Exh. S-130.
[7] Tr. 64:19-65:5.
[8] Tr. 65:6-66:8; Tr. 70:16-21; Exh. S-131.
[9] Tr. 66:12-19; Exh. S-131.
[10] Tr. 67:8-17; Exh. S-131.

but also "who is behind it and the firm."[11]

Mr. Smith testified that he participated in a conference call with Respondent Smith and Cox, along with representatives of the product sponsor and their attorneys, and that the attorneys stated that the product was not a security because "it did not meet the elements of the *Howey* test."[12]

Mr. Smith testified that his role was to help Respondent Smith and Cox ask questions to the people involved with the product and to help them "come to a place where they could make a decision on whether they wanted to move forward."[13] Mr. Smith further testified that he was "growing more uncomfortable with [his] role" and became frustrated because he was "spinning [his] wheels and not getting responses" to his questions.[14]

Mr. Smith testified that in May and December 2018, Respondent Smith contacted him to update Smith & Cox's Form U4 Uniform Application for Securities Industry Registration or Transfer ("Form U4") in order to disclose three different tax liens against Respondent Smith.[15] Mr. Smith testified that he prepared a draft of the Disclosure Reporting Page of Respondent Smith's Form U4 regarding the tax liens against him, but that to Mr. Smith's knowledge, Respondent Smith has never updated his Form U4 and Smith & Cox has never updated its Form ADV Uniform Application for Investment and Adviser Registration and Report by Exempt Reporting Advisers ("Form ADV") to disclose these tax liens.[16]

Mr. Smith testified that he did not find any lawsuits, administrative action, or criminal action regarding the income stream investments during his research in 2013.[17]

B. Dean Hebb

Mr. Hebb testified that he and his wife lived in Green Valley, Arizona, on April 30, 2015, when they invested in income stream products with Smith & Cox.[18] Mr. Hebb testified that, before investing, "[o]ne of the things we stressed is the fact that we wanted a low risk investment. And [Respondent

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[11] Tr. 67:18-68:2; Exh. S-131.
[12] Tr. 69:5-16.
[13] Tr. 77:25-78:4.
[14] Tr. 78:5-17; Exh. S-137.
[15] Tr. 87:20-88:14; Tr. 89:16-90:7; Tr. 93:19-22; Exh. S-143.
[16] Tr. 90:15-91:6; Tr. 93:23-94:4; Exh. S-143.
[17] Tr. 101:22-102:4.
[18] Tr. 114:2-6.

Smith and Cox] said, 'that's what we do and that's what we do well, you're not going to get a big return, but we want to protect your money.'"[19]

Mr. Hebb testified that prior to investing, Respondent Smith and Cox did not inform him that Respondent Smith had a $125,000 Internal Revenue Service ("I.R.S.") tax lien against him.[20]

Mr. Hebb testified that, because Smith & Cox was not organized as an LLC until January 2009, he felt Smith & Cox was misleading when, in its promotional brochures, it states, "Recommendations are based solely on what is in the client's interest. That objectivity enabled the firm to see the coming economic downturn in 2008 and position clients to minimize losses."[21]

Mr. Hebb testified that Respondent Smith and Cox indicated that Bucket 1 was "one of [the] most safe [sic] investments you can get – it is totally vetted."[22]

Mr. Hebb testified that, at the time they invested with Smith & Cox, he and his wife had a net worth less than $1,000,000 and a combined annual income of less than $300,000.[23]

Mr. Hebb testified that he invested with Smith & Cox approximately $128,000 in Bucket 1, approximately $100,000 in Bucket 2, and $265,000 in Bucket 3.[24]

Mr. Hebb testified that the investment into Bucket 1 consists of two purchase agreements, dated April 15, 2015, for Veteran Affairs ("VA") disability payment streams from two separate military persons in the amounts of $95,776.00 and $29,223.00, with an aggregate value to be paid back in the approximate amounts of $108,000 and $33,000, and with a monthly return of $1,802.55 and $555.00, respectively.[25]

Mr. Hebb testified that, when signing the two purchase agreements, Respondent Smith brought up Upstate but that Mr. Hebb never had a clear understanding of what Upstate's role is.[26] Mr. Hebb testified that he has no understanding of what SoBell is or who any of its principals are even though the company is displayed on the first page of the purchase agreements.[27] Mr. Hebb testified that he

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[19] Tr. 119:2-6; *see also* Tr. 116:7-22; Tr. 121:14-16.
[20] Tr. 118:6-9; Tr. 136:13-15.
[21] Tr. 120:1-21; Exh. S-144.
[22] Tr. 121:14-16; *see also* Tr. 163:14-164:2.
[23] Tr, 126:3-9.
[24] Tr. 170:5-25.
[25] Tr. 127:7-130:12; Exhs. S-90 and S-91.
[26] Tr. 132:5-21.
[27] Tr. 132:22-133:4; Exhs. S-90 and S-91.

believed that Life Funding Options ("LFO") was a company that served as insurance in the event that the pensioner failed to make a payment.[28]

Mr. Hebb testified that Respondent Smith and Cox never told him that federal laws might prohibit the sale or assignment of veterans' income streams.[29] Mr. Hebb testified that Respondent Smith and Cox never told him that some federal courts had determined that these types of transactions are unenforceable.[30] Mr. Hebb testified that Respondent Smith and Cox never told him that several states had issued cease and desist orders against the principal of SoBell for his prior company.[31] Mr. Hebb testified that Respondent Smith never told him that Respondent Smith had an unpaid judgment against him in Indiana by an investor for $93,000.[32]

Mr. Hebb testified that he received two letters from Upstate, dated January 18, 2017, advising him that Upstate had failed to receive his January payments for his two investments in Bucket 1.[33] Mr. Hebb testified that on May 11, 2017, he and Respondent Smith entered into a promissory agreement wherein Smith & Cox would pay Mr. Hebb $6,900.00 to cover an anticipated three months of missed payments.[34]

Mr. Hebb testified that, on January 25, 2018, he and his wife met with Respondent Smith and that Respondent Smith indicated that, starting on February 15, 2018, they would start receiving payments on their investments in Bucket 1, including make-up payments, until they received $138,000.00 in total.[35] Mr. Hebb further testified that Respondent Smith indicated that the $138,000.00 would come from damages as a result of a lawsuit against LFO.[36]

Mr. Hebb testified that Respondent Smith never told him that there is a risk that federal law may prohibit a creditor from trying to recover any money from a veteran on the sale of pension payments or disability benefits.[37]

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[28] Tr. 133:5-134:15.
[29] Tr. 135:19-22.
[30] Tr. 135:23-136:1.
[31] Tr. 136:6-12.
[32] Tr. 136:16-19.
[33] Tr. 137:9-138:7; Exh. S-145.
[34] Tr. 138:8-139:20; Exh. S-145.
[35] Tr. 145:3-19; Exh. S-147.
[36] Tr. 145:20-146:1.
[37] Tr. 147:8-16.

Mr. Hebb testified that he understood that Cox was the "insurance guy" and Respondent Smith was the "stocks guy," and that they "kept a fairly distinct line between them."[38]

Mr. Hebb testified that, of the approximate $128,000 he invested in Bucket 1, there is still approximately $104,000 left to be returned.[39]

C. Lois Anne Zettlemoyer

Ms. Zettlemoyer testified that she lived in Green Valley, Arizona, when she made six income stream investments between December 1, 2014, and January 22, 2015.[40] Ms. Zettlemoyer testified that, prior to investing, Respondent Smith and Cox indicated that the returns she could get in Bucket 1 would be the same or better than the guaranteed six percent fund her money was previously invested in.[41] Ms. Zettlemoyer testified that it was her understanding that if one of the parties paying into the income stream defaulted, her payments from Bucket 1 would be covered by PAC.[42]

Ms. Zettlemoyer testified that, prior to investing, Respondent Smith and Cox did not inform her that Respondent Smith had a $125,000 I.R.S. tax lien against him.[43] Ms. Zettlemoyer testified that, prior to investing, Respondent Smith and Cox never told her that Respondent Smith had an unpaid judgment against him in Indiana by an investor for $93,000.[44]

Ms. Zettlemoyer testified that she invested a total of $983,000 with Smith & Cox.[45] Ms. Zettlemoyer testified that "Bucket 1 was $250,000 for a defined payment income stream; Bucket 2, $241,500 for fixed index annuity; and Bucket 3, $491,000 into a managed account and REITs with a projected rate of 7.20."[46]

Ms. Zettlemoyer testified that her investment into Bucket 1 is a secured account with a rate of five percent growth.[47] Ms. Zettlemoyer testified that this investment, which consists of six separate purchase agreements, yields a monthly figure of $4,650 and an annual income of $55,800 for five

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[38] Tr. 155:11-156:16.
[39] Tr. 170:5-10.
[40] Tr. 183:9-13; Exhs. S-81, S-82, S-83, S-84, S-85, and S-86.
[41] Tr. 186:8-11; Tr. 188:14-19.
[42] Tr. 188:20-189:2.
[43] Tr. 190:9-13.
[44] Tr. 190:14-17.
[45] Tr. 192:20-193:6.
[46] Tr. 193:9-14.
[47] Tr. 193:15-18.

years.[48] Ms. Zettlemoyer testified that after taxes she would receive $3,870 a month from September 2015 to September 2020.[49] Ms. Zettlemoyer testified that she expected to make a five percent return on her investment in Bucket 1 and that she expected "to get paid more money back than [she] was paying in."[50]

Ms. Zettlemoyer testified that she does not recognize the names "Andrew Gamber" or "Michelle Plant," nor does she "really know what BAIC is."[51]

Ms. Zettlemoyer testified that she began to have problems receiving payments "about 18 months ago."[52]

Ms. Zettlemoyer testified that it is her understanding that PAC changed to LFO and that LFO was "supposedly going to follow the same procedure as [PAC] in covering the payments."[53] Ms. Zettlemoyer testified that she received letters from LFO saying that it did not have enough money to cover the payments.[54]

Ms. Zettlemoyer testified that, prior to investing, Smith & Cox never told her that there is a risk that federal law might prohibit the sale of military pension income streams or that several federal courts have held transactions of this nature unenforceable.[55]

Ms. Zettlemoyer testified that Respondent Smith and Cox did not inform her that Respondent Smith had a $43,000 I.R.S. tax lien against him for unpaid taxes.[56]

Ms. Zettlemoyer testified that she received regular payments in full amount from her investment in Bucket 1 from September 2015 until October 11, 2017.[57] Ms. Zettlemoyer testified that she has received only partial payment from her investment in Bucket 1 since October 11, 2017, and that she received her last partial payment the month prior to the hearing.[58]

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[48] Tr. 193:19-22; Tr. 219:14-18; Exhs. S-81, S-82, S-83, S-84, S-85, and S-86.
[49] Tr. 193:23-25.
[50] Tr. 198:11-17.
[51] Tr. 219:20-220:6; Tr. 220:15-18.
[52] Tr. 221:20-24.
[53] Tr. 223:25-224:11.
[54] Tr. 224:12-19.
[55] Tr. 225:25-226:7.
[56] Tr. 230:24-231:2.
[57] Tr. 256: 6-10.
[58] Tr. 256:13-18.

D. Carolyn Blythe Strong

Ms. Strong testified that in March 2015 she resided in Tucson, Arizona when she invested with Smith & Cox.[59] Ms. Strong testified that she and her husband "indicated [to Respondent Smith and Cox] that we wanted, at our age, because we were retiring and wouldn't have money coming in, we wanted to have security. We wanted to make sure our money wasn't going to be in high risk investments."[60]

Ms. Strong testified that her investment of $100,000 in Bucket 1 consists of two purchase agreements, with an effective rate of return of 5 percent and an aggregate value of $117,439.20, that yields a monthly payment of $2,000 for sixty months.[61] Ms. Strong testified that it was her understanding that PAC was "going to be backing this investment [and] would step in if there was a default."[62] Ms. Strong further testified that "[i]t seemed to [her husband and her] that it was an investment that would covered by [PAC] as a security, like an insurance."[63] Ms. Strong testified that she believed the income stream investments were not a "one-on-one" loan but rather the money was put "into a pool," thus minimizing the risks of the investments.[64]

Ms. Strong testified that it was significant to her that Smith & Cox had several clients who are military veterans, had "helped people through the 2008 crash where the banks failed us all," and had indicated they focus on people from the Midwest.[65]

Ms. Strong testified that, at the time they invested with Smith & Cox, she and her husband had a net worth less than $1,000,000 and a combined annual income of less than $300,000.[66]

Ms. Strong testified that, prior to investing, Respondent Smith and Cox did not inform her that Respondent Smith had a $125,000 I.R.S. tax lien against him, and that had she known she would not have invested with Smith & Cox.[67] Ms. Strong testified that, prior to investing, Respondent Smith and Cox never told her that Respondent Smith had an unpaid judgment against him in Indiana by an investor

[59] Tr. 262:5-8.
[60] Tr. 268:8-12.
[61] Tr. 271:13-17; Tr. 272:12-273:4; Tr. 285:4-15; Exhs. S-87, S-88 and S-151.
[62] Tr. 274:14-16.
[63] Tr. 289:2-11.
[64] Tr. 289:12-24.
[65] Tr. 278:7-279:12.
[66] Tr. 281:24-282:7.
[67] Tr. 282:8-20.

for $93,000, and that this information would have impacted her decision to invest with Smith & Cox.[68]

Ms. Strong testified that she is not familiar with the name "Andrew Gamber," that Respondent Smith and Cox did not inform her that Gamber was president of BAIC, and that Respondent Smith and Cox did not inform her Gamber had been the subject of multiple orders by state regulators for his or his company's violations of insurance and securities laws in various states.[69] Ms. Strong testified that had she known this information she and her husband "would have chosen to do another type of investment. This was our first income stream, so we were counting on this to be a secured investment for us, and we didn't want to take a risk."[70]

Ms. Strong testified that Respondent Smith and Cox never told her husband or her that there is a risk that federal law prohibits the sale or assignment of veterans' pensions or disability payments.[71] Ms. Strong testified that Respondent Smith and Cox did not inform her husband or her that in 2016 the I.R.S. recorded two liens against Respondent Smith for unpaid taxes of $43,602 and approximately $9,500.[72]

Ms. Strong testified that her experience with Smith & Cox has "been a hardship for [my husband and me] because we were counting on $2,000 per month from this investment." Ms. Strong further testified that she and her husband have had to dip into their personal retirement fund, have had to take part-time jobs, and have had to get a second mortgage on their house and consider putting the house up for sale.[73]

Ms. Strong testified that when Respondent Smith discussed risks associated with the investment into Bucket 1 "he made a point of emphasizing that [PAC] was like an insurance policy."[74]

Ms. Strong testified that from 2015 to 2017 she and her husband received full payment on their investment into Bucket 1, that from October 2017 to January 2018 they received partial payments, and from 2018 they have not received any payments.[75]

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[68] Tr. 282:21-283:4.
[69] Tr. 283:22-284:8.
[70] Tr. 284:9-16.
[71] Tr. 295:15-20.
[72] Tr. 297:14-20.
[73] Tr. 299:22-301:20.
[74] Tr. 322:3-11.
[75] Tr. 331:17-332:8.

E. Susan Hill

Ms. Hill testified that in October and November 2014 she lived in Marana, Arizona, when she invested $105,000 with Smith & Cox.[76] Ms. Hill testified that, prior to investing, she was scared to lose money and that she "remember[s] telling [Respondents Smith and Cox] that [she] was willing to take a much smaller return on a conservative investment portfolio that would give [her husband and her] income streams."[77]

Ms. Hill testified that, prior to investing, Respondent Smith and Cox never told her that Respondent Smith had an unpaid judgment against him in Indiana by an investor for $93,000.[78]

Ms. Hill testified that, because Smith & Cox was not organized as an LLC until January 2009, she felt Smith & Cox was misleading when, in its promotional brochures, it states that the firm was able to see the coming economic downturn in 2008 and position clients to minimize losses.[79]

Ms. Hill testified that, at the time they invested with Smith & Cox, she and her husband had a net worth less than $1,000,000 and a combined annual income of less than $300,000.[80]

Ms. Hill testified that, prior to investing, Respondent Smith and Cox did not inform her that Respondent Smith had a $125,000 I.R.S. tax lien against him, and that such information would have been important to her.[81]

Ms. Hill testified that she invested $106,000 into Bucket 1 and that she expected a small return on her investment.[82] Ms. Hill testified that her investment in Bucket 1 consists of two purchase agreements, with an effective rate of return of 5 percent and an aggregate value of $119,229.20, that yields a monthly payment of $1,979.91 for 60 months.[83]

Ms. Hill testified that she had no understanding of PAC's role in the investment.[84]

Ms. Hill testified that, prior to investing, Smith & Cox never told her that there is a risk that federal law might prohibit the sale of military pension income streams or that several federal courts

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[76] Tr. 340:4-8.
[77] Tr. 346:5-10.
[78] Tr. 357:14-18.
[79] Tr. 357:19-358:21.
[80] Tr. 359:16-360:2.
[81] Tr. 360:3-11.
[82] Tr. 360:25-361:4.
[83] Tr. 361:23-362:2; Tr. 367:23-368:1; Exhs. S-79 and S-80.
[84] Tr. 367:11-14.

have held transactions of this nature unenforceable.[85]

Ms. Hill testified that in May 2019 she received partial payment on her investment and discovered that no monthly deposits were made into her investment since 2017.

Ms. Hill testified that she has received a total of $64,047.63 back from her $106,000.00 investment.[86]

F. John M. McLeod

Mr. McLeod testified that he and his wife lived in Tucson, Arizona, when they invested in income stream products with Smith & Cox.[87] Mr. McLeod testified that, prior to investing, he and his wife indicated to Respondent Smith and Cox that they want wanted to have "principal preservation with an income stream" and that "the principal would be inheritable when we both passed away to my kids."[88] Mr. McLeod further testified that, prior to investing, he indicated to Respondent Smith and Cox that his risk level was "somewhere in the middle."[89]

Mr. McLeod testified that he invested $200,000.00 in Bucket 1.[90]

Mr. McLeod testified that, prior to investing, Respondent Smith and Cox did not inform him that Respondent Smith had a $125,000 I.R.S. tax lien against him, and that this information would have affected his decision to invest with Smith & Cox.[91] Mr. McLeod testified that, prior to investing, Respondent Smith and Cox never told him that Respondent Smith had an unpaid judgment against him in Indiana by an investor for $93,000, and that this information would have impacted his decision to invest with Smith & Cox.[92]

Mr. McLeod testified that he did not know that Upstate was going to provide the escrow services and that he did not know what exact function Upstate had.[93] Mr. McLeod testified that he does not know who "BAIC" or "Andrew Gamber" is.[94] Mr. McLeod testified that Respondent Smith and Cox

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[85] Tr. 370
[86] Tr. 480:8-20.
[87] Tr. 409:15-21.
[88] Tr. 412:23-413:1.
[89] Tr. 413:4-7.
[90] Tr. 418:3-5.
[91] Tr. 418:21-419:5.
[92] Tr. 419:6-14.
[93] Tr. 421:24-422:8.
[94] Tr. 427:16-20.

did not inform him that Gamber had been the subject of multiple orders by state regulators for his company's violations of insurance and securities laws and regulations.[95] Mr. McLeod testified that he does not know what PAC is.[96]

Mr. McLeod testified that Respondent Smith and Cox "always described [the income stream investments] as secured and insured."[97]

Mr. McLeod testified that he invested $200,000.00 in Bucket 1 and that the investment consisted of five different contracts. Mr. McLeod testified that two of the contracts paid through the end of their term, but that three of the contracts all stopped by May 2018.[98]

Mr. McLeod testified that Cox only dealt with Bucket 2 and that he did not "really deal with any of the rest of it."[99]

Mr. McLeod testified that he gave up a half percent of return to buy insurance but that he did not know who PAC was prior to making his investment in Bucket 1.[100]

Mr. McLeod testified that at the time he invested with Smith & Cox his net worth was more than $1,000,000.00.[101]

Mr. McLeod testified that he has received a total of $181,849.24 back from his $200,000.00 investment.[102] Mr. McLeod testified that based on the expected return and interest he is still owed $41,179.90.[103]

G. William Woerner

Mr. Woerner is an investigator for the Division and testified that he took over the investigation in this matter in November 2018.[104]

Mr. Woerner testified that he knows PAC to be a company that offered investors some protection if their income stream investments defaulted and that it is referenced in a marketing

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[95] Tr. 427:21-428:2.
[96] Tr. 428:11-14.
[97] Tr. 423:14-18.
[98] Tr. 465:1-3.
[99] Tr. 434:20-22.
[100] Tr. 437:6-11; Tr. 450:7-13.
[101] Tr. 445:19-22.
[102] Tr. 459:15.
[103] Tr. 460:12-16.
[104] Tr. 492:14-19; Tr. 497:19-25.

document as providing default protection.[105] Mr. Woerner testified that Upstate is referenced in a marketing document as providing legal escrow and payment services for the benefit of the buyer.[106]

Mr. Woerner testified that some investors had trouble articulating how much money they had actually received from their income stream investments because there was no "clean trail for the investor[s] to figure out how much money they received back as a result of the investment."[107] Mr. Woerner testified that Upstate, a South Carolina law firm which served as the "central baker for this operation," would probably be the best source for obtaining records of repayment to investors but that the Division does not have subpoena power to enforce a subpoena in South Carolina.[108] Mr. Woerner further testified that Smith & Cox, as the investment advisory firm for the investors, would be in a good position to provide this information.[109]

Mr. Woerner testified that on July 20, 2012, BAIC was formed as a Texas corporation and that its charter has since been forfeited.[110] Mr. Woerner testified that Andrew Gamber is listed as the president of BAIC on BAIC's Certificate of Formation.[111]

Mr. Woerner testified that SoBell was formed as a Mississippi corporation, that its Articles of Incorporation lists Andrew Gamber as the incorporator, and that SoBell's current corporate status is dissolved.[112]

Mr. Woerner testified that on April 14, 2008, the Arkansas Insurance Commissioner entered a Consent Order against Gamber, under which his insurance producer's license was suspended for two years and he was ordered to pay an administrative penalty.[113]

Mr. Woerner testified that on July 1, 2009, the Arkansas Insurance Commissioner entered a Consent Order against Gamber, under which he surrendered his Arkansas insurance producer's license, agreed he could not reapply for licensure for 3 years, and agreed to pay a $25,000 administrative

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[105] Tr. 504:11-21; Tr. 506:14-507:4; Exh. S-35.
[106] Tr. 507:8-16; Exh. S-35.
[107] Tr. 511:23-512:14.
[108] Tr. 513:23-514:9.
[109] Tr. 514:10-13.
[110] Tr. 516:7-13; Exh. S-8.
[111] Tr. 517:20-22; Exh. S-8.
[112] Tr. 518:7-22; Tr. 519:23-520:3; Exhs. S-9 and S-10.
[113] Tr. 521:22-522:8; Exh. S-38.

penalty.[114]

Mr. Woerner testified that he knows Voyager Financial Group, LLC ("VFG") to be a Delaware corporation in the business of selling pension stream investments.[115] Mr. Woerner testified that Gamber was the owner and managing member of VFG.[116]

Mr. Woerner testified that on April 22, 2013, the Arkansas Securities Commissioner entered a Cease and Desist Order against Gamber and VFG for selling unregistered securities involving military retirement income streams.[117]

Mr. Woerner testified that on September 20, 2013, the Iowa Insurance Commissioner entered a Consent Order against Gamber and VFG, under which they were ordered to cease and desist from violating Iowa's securities laws.[118]

Mr. Woerner testified that on December 10, 2013, the Securities Division of the New Mexico Regulation and Licensing Department entered a Cease and Desist Order against VFG, finding that it deceived investors by describing the sale of income streams from veterans' pensions and disability benefits as valid and permissible transactions, and by omitting the fact that the assignment of these income streams are prohibited by federal law.[119]

Mr. Woerner testified that on March 18, 2014, the Arkansas Securities Commissioner entered a Cease and Desist Order against VFG for violating the registration and antifraud provisions of the Arkansas Securities Act.[120]

Mr. Woerner testified that on May 9, 2014, Pennsylvania's Department of Banking and Securities entered a Consent Order against VFG, which Gamber signed on VFG's behalf, for violating the antifraud provision of the Pennsylvania's Securities Act of 1972.[121]

Mr. Woerner testified that on June 23, 2014, the Arkansas Securities Commissioner entered a Consent Order against Gamber and VFG for violating the registration and antifraud provisions of the

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[114] Tr. 522:23-523:20; Exh. S-39.
[115] Tr. 523:21-25.
[116] Tr. 523:25-524:2.
[117] Tr. 524:11-525:7; Exh. S-40.
[118] Tr. 525:24-526:12; Exh. S-41.
[119] Tr. 526:15-528:1; Exh. S-42.
[120] Tr. 528:21-25; Tr. 529:25-530:9; Exh. S-43.
[121] Tr. 530:13-531:23; Exh. S-44.

Arkansas Securities Act.[122]

Mr. Woerner testified that on August 26, 2014, Florida's Office of Financial Regulation entered a Final Order against VFG for selling military retirement income streams as unregistered securities.[123]

Mr. Woerner testified that on November 7, 2014, California's Department of Business Oversight entered a Desist and Refrain Order against VFG for selling military retirement income streams as unregistered securities in violation of the antifraud provision in Section 25401 of the California Corporate Securities Law of 1968.[124]

Mr. Woerner testified that Gamber was the president of BAIC and the incorporator of SoBell.[125]

Mr. Woerner testified that Corbett is a California resident who had access to multiple websites which attempted to market to veterans and military retirees the fact that they could sell a portion of their military pension or disability benefits for a lump sum payment.[126]

Mr. Woerner testified that Kern-Fuller is a partner in Upstate, a South Carolina law firm that was incorporated as a limited liability company on September 9, 2008.[127] Mr. Woerner testified that Upstate had two major roles with respect to the income stream investments -- providing legal services to the buyer and seller and operating as the "central bank."[128] Mr. Woerner testified that Upstate would receive the pension income from veterans, receive the payments from the investors, distribute commissions to the various parties involved, including itself, and distribute the monthly payments to the investors.[129]

Mr. Woerner testified that Smith & Cox was organized on January 15, 2009.[130]

Mr. Woerner testified that a Form U4 is used by an investment advisor as an initial application, reviewed by the Division, to be registered with the Commission as an investment advisor representative.[131] Mr. Woerner further testified that the Form U4 is used to update an investment

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[122] Tr. 532:2-533:15; Exh. S-45.
[123] Tr. 533:19-535:1; Exh. S-46.
[124] Tr. 535:5-536:4; Exh. S-47.
[125] Tr. 544:5-11.
[126] Tr. 545:10-16.
[127] Tr. 553:25-555:6; Exhs. S-12 and S-13.
[128] Tr. 555:18-556:3.
[129] Tr. 556:3-557:9.
[130] Tr. 560:4-6; Exh. S-15.
[131] Tr. 560:7-22.

advisor representative's registration within 30 days after any material changes have occurred since the initial application.[132] Mr. Woerner testified that a Form ADV is used similarly to a Form U4 but that it applies to an investment advisor firm seeking registration as an investment advisor.[133]

Mr. Woerner testified that on January 29, 2009, Respondent Smith filed a Form U4 with the Commission to become an investment adviser representative and a Form ADV, on behalf of Smith & Cox, for Smith & Cox to become an investment adviser.[134] Mr. Woerner testified that on July 13, 2009, Respondent Smith was approved by the Commission as an investment adviser representative and Smith & Cox was approved by the Commission as an investment advisory firm.[135]

Mr. Woerner testified that the Form U4 and the Form ADV ask, "Do you have any unsatisfied judgments or liens against you?"[136] Mr. Woerner testified that on both occasions Respondent Smith erroneously answered "No" because he had not satisfied a $93,000 judgment from 2006 that he owes to an investor in Indiana.[137]

Mr. Woerner testified that on July 25, 2011, Respondent Smith filed a Form U4 Amendment.[138]

Mr. Woerner testified that on June 25, 2013, the I.R.S. recorded a Notice of Federal Tax Lien in Pima County against Respondent Smith for $125,079 in unpaid taxes from 2007 and 2008.[139] Mr. Woerner testified that Respondent Smith has never satisfied the I.R.S.'s $125,079 lien.[140]

Mr. Woerner testified that on September 13, 2013, February 20, 2014, February 2, 2016, and April 7, 2016, Respondent Smith, on behalf of Smith & Cox, filed Smith & Cox's Form ADV Amendments.[141]

Mr. Woerner testified that the Form ADV Amendments ask, "Are there any unsatisfied judgments or liens against you, any advisory affiliate, or any management person?"[142] Mr. Woerner testified that on all four occasions Respondent Smith erroneously answered "No" because he had not

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[132] Tr. 560:23-561:6.
[133] Tr. 561:7-21.
[134] Tr. 563:3-22; Exhs. S-19 and S-20.
[135] Tr. 565:15-566:9; Exhs. S-16 and S-17.
[136] Tr. 563:24-564:19; Exhs. S-19 and S-20.
[137] Tr. 564:20-565:4; Exhs. S-19 and S-20.
[138] Tr. 567:7-9; Exh. S-21.
[139] Tr. 567:17-23; Exh. S-26.
[140] Tr. 568:6-12.
[141] Tr. 569:4-8; Tr. 570:7-12; Tr. 571:12-19; Tr. 572:19-23; Exhs. S-22, S-23, S-24, and S-25.
[142] Tr. 569:15-22; Tr. 570:20-571:6; Tr. 572:1-11; Tr. 573:6-12; Exhs. S-22, S-23, S-24, and S-25.

satisfied the $93,000 judgment from 2006 and because of the June 25, 2013, unsatisfied tax lien against Respondent Smith.[143]

Mr. Woerner testified that on August 2, 2016, the I.R.S. recorded a Notice of Federal Tax Lien in Pima County against Respondent Smith for $9,594.40 in unpaid taxes from 2014.[144] Mr. Woerner testified that on August 29, 2017, the I.R.S. recorded a Notice of Federal Tax Lien in Pima County against Respondent Smith for $43,602.71 in unpaid taxes from 2009.[145] Mr. Woerner testified that Respondent Smith has never satisfied the 2016 and 2017 liens against him for unpaid taxes.[146]

Mr. Woerner testified that Respondent Smith has never updated his Form U4 or Smith & Cox's Form ADV to disclose that he has not satisfied a $93,000 judgment against him or to disclose the I.R.S.'s 2013, 2016, and 2017 unsatisfied liens against him for unpaid taxes.[147]

Mr. Woerner testified that he prepared a summary of the 53 income stream investments that Smith & Cox sold.[148] Mr. Woerner testified that from October 2013 to November 2015, Smith & Cox sold 53 income stream investments to 21 investors for a total purchase price of $2,776,952.62.[149] Mr. Woerner testified that he prepared a summary of financial information related to the income stream investments and that Smith & Cox received a little over 5% commission on the income stream investments it sold.[150]

Mr. Woerner testified that Corbett used websites and ads to attract people who wanted to sell their income stream investments.[151] Mr. Woerner testified that Upstate's role could be described as providing escrow services as well as serving as the "central bank."[152] Mr. Woerner testified that the buyers (investors) would send their payments, and the sellers (veterans) would send their pension streams, to Upstate.[153] Mr. Woerner testified that Upstate would then distribute a portion of the money back to the seller, distribute the monthly payments to the investors, and distribute commissions to the

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[143] Tr. 569:23-570:6; Tr. 571:7-11; Tr. 572:12-18; Tr. 13-16; Exhs. S-22, S-23, S-24, and S-25.
[144] Tr. 574:7-15; Exh. S-27.
[145] Tr. 575:3-6; Exh. S-28.
[146] Tr. 574:22-575:2; Tr. 576:8-14.
[147] Tr. 578:20-579:10.
[148] Tr. 582:20-583:6; Exh. S-50.
[149] Tr. 589:25-590:18; Exh. S-50.
[150] Tr. 592:7-20; Tr. 596:20-597:2; Exh. S-108.
[151] Tr. 625:19-23.
[152] Tr. 628:14-23.
[153] Tr. 631:25-632:8.

various individuals and entities involved.[154]

Mr. Woerner testified that defaults occurred because the sellers had their respective pensions stop sending money to Upstate, causing the investors not to receive their monthly payments.[155] Mr. Woerner testified that it was his understanding that the seller always had the right to contact the pension provider and direct the payments to stop going to Upstate.[156] Mr. Woerner testified that in some cases, after a default, PAC would step in and make payments to the investors.[157]

Mr. Woerner testified that a total of 10 orders against Gamber and/or VFG, all from state regulatory agencies, existed when Respondent Smith sold the income stream investments.[158] Mr. Woerner testified that he is not aware of a central database that exists to search for such orders.[159]

Mr. Woerner testified that Respondent Smith, in Smith & Cox's Form ADVs, disclosed the $93,000 from 2006 but that he did not disclose that the judgment was still outstanding.[160]

Mr. Woerner testified that Upstate would be the best source for providing records of how much money the investors received back from their investment.[161] Mr. Woerner testified that the investors and/or Smith & Cox may also have documentation indicating what monies, if any, the investors received back from their investment.[162]

H. Christopher Spence Cox

Mr. Cox testified that he has lived in Oro Valley, Arizona, for the last 12 years.[163]

Mr. Cox testified that in 2008 he and Respondent Smith formed Preferred Resource Group ("PRG"), an Arizona company that sold life insurance and annuities.[164] Mr. Cox testified that in 2009 he and Respondent Smith changed the name of their company to Smith & Cox.[165]

Mr. Cox testified that when he and Respondent Smith transitioned into Smith & Cox,

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[154] Tr. 633:22-635:9.
[155] Tr. 646:23-647:5.
[156] Tr. 647:6-12.
[157] Tr. 648:4-13.
[158] Tr. 656:11-18; Exhs. S-38, S-39, S-40, S-41, S-42, S-43, S-44, S-45, S-46, and S-47.
[159] Tr. 660:2-7.
[160] Tr. 674:10-675:4; Exh. S-19.
[161] Tr. 690:11-14.
[162] Tr. 690:15-691:5.
[163] Tr. 726:22-25.
[164] Tr. 736:19-737:20.
[165] Tr. 744:8-15.

Respondent Smith got a securities license so Smith & Cox could offer securities products to its clients.[166] Mr. Cox testified that he "wanted to stay on the insurance side of things" and that "from a company policy, [he and Respondent Smith] thought it would be good to have a company where this person handles this and this person handles that."[167]

Mr. Cox testified that, prior to 2015, he, Respondent Smith, and Smith & Cox had not been the subject of a written customer complaint and had never been sued or served with a demand for arbitration.[168]

Mr. Cox testified that between 2009 and 2015 Smith & Cox took steps to avoid problems with clients and regulators. Mr. Cox testified that Smith & Cox hired Advisors Excel, a company that has "all kinds of compliance department, in-house attorneys, and everything in place to make sure that all of your ducks are in a row."[169] Mr. Cox testified that Smith & Cox has worked with Mr. Smith "for a number of years."[170] Mr. Cox testified that all marketing materials were approved by Advisors Excel.[171] Mr. Cox testified that Smith & Cox utilized Advisors Excel "to make sure all products are approved and licensed properly and available in the state that you're looking to offer it in."[172] Mr. Cox testified that if a product was neither an insurance based product or a security, Smith & Cox "directed it to [Mr. Smith.]"[173]

Mr. Cox testified that prior to offering the income stream investments to investors neither he nor Respondent Smith thought the income stream investments were securities.[174] Mr. Cox testified that after Mr. Smith did his research into the income stream investments, he "put the ball a little bit in [Respondent Smith's] court."[175]

Mr. Cox testified that, prior to offering the income stream investments, he and Respondent Smith talked directly about the SEC Alert and that he wanted to make sure Respondent Smith "followed

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[166] Tr. 745:9-16.
[167] Tr. 745:17-21.
[168] Tr. 758:19-759:7.
[169] Tr. 760:8-16.
[170] Tr. 760:17-21.
[171] Tr. 760:24-761:10.
[172] Tr. 761:25-762:7.
[173] Tr. 765:10-14.
[174] Tr. 765:17-22.
[175] Tr. 768:9-19.

up, talked to his different contacts that he was working with, and felt satisfied with what they shared with him."[176] Mr. Cox testified that Respondent Smith indicated he had spoken with lawyers as part of his due diligence into the income stream investments.[177]

Mr. Cox testified that by September 12, 2013, he and Respondent Smith decided to start offering the income stream investments to investors.[178] Mr. Cox testified that Respondent Smith always presented the income stream investments to potential investors and that Cox was present during the presentations.[179]

Mr. Cox testified that Smith & Cox received a 5% commission rate on income stream investments that it sold.[180]

Mr. Cox testified that Respondent Smith never used the terms "guarantee" or "insurance" in his presentation regarding the income stream investments.[181]

Mr. Cox testified that he first learned of the defaults from Respondent Smith but that he was not involved in any "post-default efforts."[182]

Mr. Cox testified that he has been married to Beth Cox since 2007 and that income from Smith & Cox was used to pay at least a portion of his living expenses.[183] Mr. Cox testified that he and Respondent Smith are managing members of Smith & Cox.[184]

Mr. Cox testified that a 2018 marketing handout represented that Smith & Cox was able "to see the coming economic downturn in 2008 and position clients to minimize losses."[185] Mr. Cox testified that Smith & Cox did not exist in 2008 and thus did not have any clients in 2007 or 2008.[186]

Mr. Cox testified that he knew the income stream investments were risky and complex investments.[187] Mr. Cox testified that it was a red flag to him "personally" that the SEC Alert cautioned

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[176] Tr. 770:11-20.
[177] Tr. 770:21-771:2.
[178] Tr. 769:11-17; Exh. S-141.
[179] Tr. 773:4-12; Tr. 778:8-11.
[180] Tr. 787:14-17.
[181] Tr. 788:17-789:6.
[182] Tr. 791:9-21.
[183] Tr. 793:8-14; Tr. 796:3-21.
[184] Tr. 797:6-13.
[185] Tr. 808:5-11; Exh. S-119.
[186] Tr. 808:12-17.
[187] Tr. 810:14-16.

that the income stream investments may not be legal, that they may be securities, and that they may not be enforceable.[188]

Mr. Cox testified that Respondent Smith and Cox each own fifty percent of Smith & Cox and that they share management responsibilities "about 60/40," with Respondent Smith doing the sixty percent and Cox doing the forty percent.[189]

Mr. Cox testified that in 2009 he first learned that Respondent Smith was the subject of an unpaid judgment from Indiana by one of his former clients and that it was his understanding that the judgment remains unpaid.[190]

Mr. Cox testified that the investors that invested in the income stream investments invested their retirement savings, or a portion thereof.[191] Mr. Cox testified that in exchange for the lump sum payment they expected to receive a modest profit.[192]

Mr. Cox testified that the investors that invested in the income stream investments were relying on other people in the process to ensure that the investment succeeded.[193] Specifically, Mr. Cox testified that the investors were relying on BAIC, SoBell, and Upstate to ensure that the transaction was legal, Smith & Cox to ensure that the investment was handled in the right way, and Upstate to ensure that all the documentation, and the entire process, was complete.[194]

Mr. Cox testified that, prior to going into business with Respondent Smith, he did not contact the Indiana Department of Insurance or otherwise determine whether there were any regulatory problems in Respondent Smith's background.[195]

Mr. Cox testified that the tax lien information and the $93,000 judgment against Respondent Smith are material information about Respondent Smith's background.[196]

Mr. Cox testified that he never heard Respondent Smith disclose his tax liens or the unpaid judgment against him to potential investors during his presentation of the income stream

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[188] Tr. 810:19-811:2; Tr. 811:14-813:1; Exh. S-131.
[189] Tr. 816:12-24.
[190] Tr. 818:10-24.
[191] Tr. 837:18-20
[192] Tr. 837:21-838:2.
[193] Tr. 839:2-5.
[194] Tr. 839:16-841:5.
[195] Tr. 845:12-23.
[196] Tr. 853:21-854:3.

investments.[197] Mr. Cox testified that he is unaware of any "obligation to disclose to clients at face-to-face meetings about negative things in your background."[198]

Mr. Cox testified that, with respect to the representation in the marketing materials that Smith & Cox was the firm that projected the economic downturn in 2008 and advised its clients accordingly, he and Respondent Smith were actually partners at PRG in 2008.[199] Mr. Cox testified that, because when he and Respondent Smith changed their company's name to Smith & Cox in 2009 it was merely a name change with no change in clientele, he does not believe they were "misleading or deceiving in any way."[200]

Mr. Cox testified that he does not believe the income stream investments to be securities but rather "alternative investments."[201]

I. William Andrew Smith

Respondent Smith testified that he has lived in Oro Valley, Arizona, since 2007.[202] Respondent Smith testified that he has been married for 38 years.[203]

Respondent Smith testified that since 2006 he pays $400 a month to pay off the $93,000 judgment against him.[204]

Respondent Smith testified that, with respect to the representation in the marketing materials that Smith & Cox was the firm that projected the economic downturn in 2008 and advised its clients accordingly, he does not think it was deceptive because "companies change names all the time."[205]

Respondent Smith testified that he had discussions with Upstate about the income stream investments and that having a law firm involved was the "tipping point" that made Respondent Smith feel comfortable in selling them.[206] Respondent Smith testified that he believes the income stream investments are permissible because there is no assignment from the buyer to the seller.[207]

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[197] Tr. 871:1-25.
[198] Tr. 873:18-22.
[199] Tr. 875:3-15.
[200] Tr. 876:3-11.
[201] Tr. 848:8-10; Tr. 848:25-849:2; Tr. 879:9-12.
[202] Tr. 897:2-5.
[203] Tr. 897:20-21.
[204] Tr. 900:6-14.
[205] Tr. 905:1-7.
[206] Tr. 907:24-908:8.
[207] Tr. 908:25-909:20.

Respondent Smith testified that when he was offering the income stream investments to potential investors he had never heard of "Andrew Gamber" and was not aware of any state orders issued against him.[208]

Respondent Smith testified that he decided to stop selling the income stream investments in 2015 when he was made aware of a Texas cease and desist order.[209]

Respondent Smith testified that the SEC has not issued any updates to the SEC Alert issued in May 2013.[210]

Respondent Smith testified that he used income from Smith & Cox to pay his and his wife's living expenses.[211]

Respondent Smith testified that his failure to update his Form U4 and Smith & Cox's Form ADV to disclose the tax liens was an oversight.[212] Respondent Smith testified that he has never updated his Form U4 or Smith & Cox's Form ADV to disclose the tax liens or the fact that the $93,000 judgment against him is unpaid.[213]

Respondent Smith testified that the investors that invested in the income stream investments expected to receive modest profit or modest return on their investment.[214]

Respondent Smith testified that the investors that invested in the income stream investments were relying on people and firms in the process to make the investment "work for them," specifically Smith & Cox and Upstate.[215]

Respondent Smith testified that he did not present the SEC Alert to potential investors during his presentation of the income stream investments because "some of [] the SEC thing didn't apply just from the assignment standpoint."[216]

Respondent Smith testified that he made clear to all the investors that invested in the income

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[208] Tr. 941:22-942:14.
[209] Tr. 942:25-944:7.
[210] Tr. 945:1-11.
[211] Tr. 982:21-24.
[212] Tr. 982:25-983:3.
[213] Tr. 988:23-989:12.
[214] Tr. 996:4-8.
[215] Tr. 996:13-20.
[216] Tr. 1006:8-10; Tr. 1006:24-1007:8.

stream investments that the seller, at any time, "could change his mind."[217]

IV. Legal Argument

The Division contends that Respondents violated the registration and license requirements of A.R.S. §§ 44-1841[218] and 44-1842[219] and the anti-fraud provisions of A.R.S. §§ 44-1991(A)[220] and 44-3241(A).[221]

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[217] Tr. 1060:3-14.

[218] A.R.S. § 44-1841 provides:

> A. It is unlawful to sell or offer for sale within or from this state any securities unless the securities have been registered pursuant to article 6 or 7 of this chapter or are federal covered securities if the securities comply with section 44-1843.02 or chapter 13, article 12 of this title.
>
> B. A person violating this section is guilty of a class 4 felony.

[219] A.R.S. § 44-1842 provides:

> A. It is unlawful for any dealer to sell or purchase or offer to sell or buy any securities, or for any salesman to sell or offer for sale any securities within or from this state unless the dealer or salesman is registered as such pursuant to the provisions of article 9 of this chapter.
>
> B. A person violating this section is guilty of a class 4 felony.

[220] A.R.S. § 44-1991 provides:

> A. It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under section 44-1843 or 44-1843.01 and including transactions exempted under section 44-1844, 44-1845 or 44-1850, directly or indirectly to do any of the following:
>
> 1. Employ any device, scheme or artifice to defraud.
> 2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
> 3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.
>
> B. In a private action brought pursuant to subsection A, paragraph 2 of this section or section 44-1992, if the person who offered or sold the security proves that any portion or all of the amount recoverable under subsection A, paragraph 2 of this section or section 44-1992 represents an amount other than the depreciation in value of the subject security resulting from the part of the prospectus or oral communication, with respect to which the liability of the person is asserted, not being true or omitting to state a material fact required to be stated or necessary to make the statement not misleading, then the amount shall not be recoverable. This subsection does not apply to any actions based on allegations of activities constituting dishonest or unethical practices in the securities industry.

[221] A.R.S. § 44-3241 provides:

> A. It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving the provision of investment advisory services, directly or indirectly, to do any of the following:
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> 1. Employ any device, scheme or artifice to defraud.
> 2. Make any untrue statement of material fact, or fail to state any material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading.
> 3. Misrepresent any professional qualifications with the intent that the client rely on the misrepresentation.
> 4. Engage in any transaction, practice or course of business that operates or would operate as a fraud or deceit.
>
> B. A person who violates this section is liable to any person for all losses incurred by that person as a result of the violation, together with interest on losses incurred, court costs and reasonable

A. A.R.S. §§ 44-1841 and 44-1842

The Division contends that Respondent Smith and Smith & Cox violated the registration and license requirements of A.R.S. §§ 44-1841 and 44-1842 by selling income stream investments without first registering the investments as securities. The Division argues that the income stream investments are securities pursuant to A.R.S. § 44-1801(27)[222] because the investments consisted of investment contracts, evidences of indebtedness, and notes.

1. Investment Contracts

The Division contends that the income stream investments are investment contracts as defined in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). The Smith & Cox Respondents disagree. Under the *Howey* test, "an 'investment contract' arises whenever a person (1) invests money (2) in a common enterprise (3) with an expectation of profits from the efforts of others, and when such third-party efforts are 'the undeniably significant ones, those essential managerial efforts which effect the failure or success of the enterprise.'"[223] The parties do not dispute that the *Howey* test is appropriate to determine whether the income stream investments are securities and do not dispute that the first prong has been met. The parties, however, dispute whether the second and third prongs of the *Howey* test have been established.

The second prong of the *Howey* test is a common enterprise and a "common enterprise will be found when either horizontal commonality or vertical commonality exists."[224] While the parties agree

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attorney fees. A civil action under this section is barred unless it is brought within three years after the violation or within two years after discovery of the facts constituting the violation, whichever occurs first.

C. A person who violates this section is guilty of a class 4 felony.

[222] A.R.S. § 44-1801(27) provides the definition of "Security:"

a. Means any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, viatical or life settlement investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, real property investment contract or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

b. Notwithstanding subdivision (a) of this paragraph, with respect to a virtual coin shall not be construed more broadly than the term security is construed in the securities act of 1933, the securities exchange act of 1934 or any federal regulations relating to either act.

[223] *Siporin v. Carrington*, 200 Ariz. 97, 101 (App. 2001) (quoting *Nutek Info. Sys., Inc. v. Arizona Corp. Comm'n*, 194 Ariz. 104, 108 (App. 1998)).

[224] *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 566 (App. 1987).

that there is no horizontal commonality, they dispute whether vertical commonality exits. To satisfy the vertical commonality requirement there must be "an enterprise common to an investor and seller, promoter, or some third party. . ." A common enterprise exists when the investor and seller's, promoter's, or third party's "interest does not end upon the consumption of the purchase agreement," thus creating a positive correlation between the success of the investor and the success of the promoter.[225]

The Division contends that vertical commonality exists in this matter because Upstate was both a promoter of and a participant in the investments, and its interest did not end at the closing of the sale.[226] Rather, the Division argues that Upstate's role and interest continued for years as the parties' escrow agent and that Upstate received the veterans' monthly retirement and disability payments and then disbursed the monthly payments to the investors.[227]

The Smith & Cox Respondents contend that the vertical commonality does not exist in this matter because the success of the income stream investments is contingent solely on the seller.[228] The Smith & Cox Respondents argue that success is only achieved if the buyer receives continuous payments from the seller's pension fund until the final payment and that the buyer is strictly dependent on the seller, who can default by re-directing the income stream away from the buyer or by death.[229]

The Division, in its Reply Brief, disputes the Smith & Cox Respondents' contention that the success of the income stream investments is contingent solely on the seller. Because Upstate would contact a seller in the event payment was not received to try and resolve the issue, the Division argues that Upstate's continued participation is evidence that success of the investments is also contingent on Upstate.[230] Further, the Division notes that Upstate depended on the payments of the seller as well as the investors, and that "[w]ithout the veteran's payments, [Upstate] would not continue to receive its fees."[231] The Division contends that if the veteran continued payments, both the investor and Upstate

[225] *Daggett*, 152 Ariz. At 566.
[226] Division's Brief at 40-42.
[227] *Id.*
[228] Smith & Cox Respondents' Response at 16.
[229] *Id.*
[230] Division's Reply at 8.
[231] *Id.*

got paid.[232] The Division further contends that "[i]f the veteran stopped payments, neither the investor nor [Upstate] got paid."[233] Therefore, the Division argues, this is evidence that a positive correlation exists between the success of the investor and the success of Upstate.[234]

Additionally, the Division argues that PAC's continued participation in the investments is evidence that success of the investments is also contingent on PAC.[235] In the event of a default, the Division contends that PAC's role was to guarantee that the investor would continue to receive equal monthly payments over the remaining term of the contract.[236] The Division contends that PAC was supposed to start making payments on the veteran's behalf three months after the veteran defaulted.[237] Thus, the Division argues, the success of the income stream investments was contingent on PAC making the remaining payments the investors were owed.[238]

We agree with the Division that the second prong of the *Howey* test has been established. Because neither Upstate's nor PAC's interests ended with the sale of an income stream to an investor, and because Upstate continued to receive payments so long as the investment wasn't in default, and because the investor relied on PAC's ability to maintain adequate reserves in order to get paid, a positive correlation exists between the success (or failure) of Upstate and PAC and the success (or failure) of the investors. Accordingly, a common enterprise exists.

To satisfy the third prong of the *Howey* test, the expectation of profit through the efforts of others, it must be established that the efforts "are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."[239]

The Division contends that the investors expected to receive a profit from their income stream investments and that they relied on the expertise, skills, and efforts of Smith & Cox and Upstate for the investments to succeed.[240] The Division notes that the investors' role was completely passive with no

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[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] Division's Reply at 8-10.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *S.E.C. v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973).
[240] Division's Brief at 43-45.

management responsibilities and no control over whether the investments paid or not.[241]

The Smith & Cox Respondents contend that the third prong of the *Howey* test is met when it is determined that a third party provided essential managerial efforts that effected the failure or success of the investment.[242] The Smith & Cox Respondents contend that, in *Siporin*, the court focused on Carrington's activities and acknowledged that the expected profits "depended entirely on Carrington's entrepreneurial and managerial skills."[243] [244] The Smith & Cox Respondents argue that this matter is distinguishable from *Siporin* because the profitability of a buyer's lump sum purchase did not depend exclusively on the efforts of third parties, as in *Siporin*, but on the future conduct of the seller in his performance under the purchase agreement.[245] The Smith & Cox Respondents contend that the pre-purchase activities were merely marketing and administrative functions of finding and matching buyers and sellers based on nothing more than available funds.[246] The Smith & Cox Respondents argue that, in this matter, aside from Upstate, as an escrow, providing important continuous administrative assistance, there was little expertise and basically no managerial efforts provided by third parties.[247] The Smith & Cox Respondents state, "[I]t was the buyer who decided on whether to enter into the purchase agreement with the seller, based on his review (along with his advisor) of the seller's pension information and personal credit history. The third parties did nothing more than provide the seller's filled out forms to the buyer for the buyer's evaluation."[248]

The Division, in its Reply Brief, contends that, as represented to the investors, the managerial efforts of Smith & Cox, Upstate, and PAC were undeniably significant ones.[249] The Division argues that Smith & Cox represented that they created balanced financial strategies to protect and grow their clients' wealth, claimed that Respondent Smith is an expert on veteran's benefits, and assured that they had "totally vetted" the investments and that it is one of the safest investments available.[250] The

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[241] Division's Brief at 45.
[242] Smith & Cox Respondents' Response at 17.
[243] *Siporin*, 200 Ariz. at 102.
[244] Smith & Cox Respondents' Response at 20.
[245] Smith & Cox Respondents' Response at 23.
[246] Smith & Cox Respondents' Response at 22.
[247] *Id.*
[248] *Id.*
[249] Division's Reply at 13.
[250] *Id.*

Division argues that Upstate's managerial efforts included doing background checks on the veterans to ensure legitimacy, serving as the investors' "legal representation," preparing and filing documentation to "perfect" the buyer's security interest in the seller's income, and processing the veterans' monthly payments in its trust account and sending them to the investors.[251] The Division argues that PAC's significant role was default protection.[252]

We agree with the Division that third parties' managerial efforts were significant and that they had significant roles in the success and expectation of profit. We disagree with the Smith & Cox Respondents that third parties, including Smith & Cox, did nothing more than provide filled out forms for the buyers to evaluate. Investors testified that they communicated to Respondent Smith and Cox that they wanted safe and secure investments and that Respondent Smith and Cox characterized the income stream investments as such, making assurances that the investments were totally vetted and that it is one of the safest investments available. "When the investor is relatively uninformed and then turns over his money to others, essentially depending upon their representations and their honesty and skill in managing it, the transaction is generally considered to be an investment contract."[253]

We find that the third prong of the *Howey* test has been established and that there is sufficient evidence that the investors had an expectation of profits through the efforts of others.

In deciding whether an investment constitutes an investment contract, the *Howey* Court explains that the term "investment contract" has "been broadly construed by state courts so as to afford the investing public a full measure of protection."[254] "Substance controls over form when determining whether a financial arrangement constitutes an investment contract because 'the definition of a security embodies a flexible rather than a strict principle, one that is capable of adaptation to meet the countless and variable schemes derived by those who seek the use of the money of others on the promise of profits.'"[255] Because of the broadly construed definition of security, and because all three prongs of the *Howey* test have been established, we find that the income stream investments are securities as

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[251] Division's Reply at 13-14.
[252] Division's Reply at 14.
[253] *Rose v. Dobras*, 128 Ariz. 209, 213 (App. 1981) (quoting *S.E.C. v. Heritage Tr. Co.*, 402 F.Supp. 744, 749 (D. Ariz. 1975)).
[254] *Howey*, 328 U.S. at 298.
[255] *Siporin*, 200 Ariz. at 101 (quoting *Nutek*, 194 Ariz. at 108).

investment contracts within the meaning of A.R.S. § 44-1801(27).

2. Evidences of Indebtedness

The Division contends that the income stream investments are evidences of indebtedness. The term "evidence of indebtedness" includes "all contractual obligations to pay in the future for consideration presently received."[256]

The Division contends that the income stream investments are evidences of indebtedness because they represent to be, through marketing materials and documents, contractual obligations for the veterans to pay their future retirement and disability benefits to the investors in exchange for the discounted lump sums the veterans received at the closings.[257]

The Smith & Cox Respondents do not provide any argument, analysis, or authority refuting this allegation other than to state that this theory "simply do[es] not apply under the facts of this case."[258] We agree with the Division that the income stream investments involved a contractual obligation wherein the sellers received a discounted lump sum in exchange for forwarding their retirement or disability payments to Upstate to facilitate the investors receiving a monthly return on their investments. Accordingly, we find that the income stream investments are securities as evidences of indebtedness within the meaning of A.R.S. § 44-1801(27).

3. Notes

The Division contends that the income stream investments are notes. "If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a 'security.'"[259]

The Division contends that the income stream investments are notes because they provided for payment of principal and annual interest after a specified term.[260] The Division argues that, in substance, each investment was a "note" and subject to the Securities Act's registration requirements

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[256] *United States v. Austin*, 462 F.2d 724, 736 (10th Cir.).
[257] Division's Brief at 46.
[258] Smith & Cox Respondents' Response at 23.
[259] *Reves v. Ernst & Young*, 494 U.S. 56, 66 (1990).
[260] Division's Brief at 48.

unless an exemption applied.[261] The Division contends that under A.R.S. § 44-2033,[262] it was Respondents' burden to show that an exemption applied, and that Respondents presented no such evidence.[263]

The Smith & Cox Respondents do not provide any argument, analysis, or authority refuting this allegation other than to state that this theory "simply do[es] not apply under the facts of this case."[264] We agree with the Division that the income stream investments are notes because the purchase agreements provided that the investors receive a monthly payment and annual interest after a specified term. Accordingly, we find that the income stream investments are securities as notes within the meaning of A.R.S. § 44-1801(27).

4. Conclusion

Because the income stream investments are securities, and because they were not registered with the Commission, we find that Respondent Smith and Smith & Cox violated A.R.S. § 44-1841 when they offered and sold the unregistered securities. Furthermore, because Smith & Cox is not registered as a dealer and Respondent Smith is not registered as a salesman, we find that they violated A.R.S. § 44-1842 when they offered and sold unregistered securities without being registered with the Commission to do so.

B. A.R.S. §§ 44-1991 and 44-3241

The Division asserts that Respondent Smith and Smith & Cox committed securities fraud in violation of A.R.S. § 44-1991(A) and investment advisory fraud in violation of A.R.S. § 44-3241(A). Specifically, the Division contends that Respondent Smith and Smith & Cox:

- Failed to disclose to investors that the Federal Anti-Assignment Acts, 38 U.S.C. §

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[261] *Id.*

[262] A.R.S. § 44-2033 provides:

> In any action, civil or criminal, when a defense is based upon any exemption provided for in this chapter, the burden of proving the existence of the exemption shall be upon the party raising the defense, and it shall not be necessary to negative the exemption in any petition, complaint, information or indictment, laid or brought in any proceeding under this chapter.

[263] Division's Brief at 48.

[264] Smith & Cox Respondents' Response at 23.

5301(a)[265] and 37 U.S.C. § 701(c),[266] prohibit the sale or assignment of veterans' pension and disability payments;

- Misrepresented in the Contract for Sale of Payments that the transaction was "valid" and not an "impermissible assignment" while failing to disclose the impact of the Federal Anti-Assignment Acts;
- Misled investors that regulations restrict the assignment of pension and disability payments when the Federal Anti-Assignments do not just "restrict" but prohibit their assignment;
- Represented that "certain courts have held transactions of this nature to be enforceable" but a future court might not, while failing to disclose that several courts applying the Federal Anti-Assignment Acts have held transactions of this nature to be unenforceable;
- Misled investors about the risk that a veteran might re-direct the pension or disability

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[265] 38 U.S.C. § 5301(a) provides:

> **(1)** Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.
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> **(2)** For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.
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> **(3)** **(A)** This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.
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> **(B)** Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).
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> **(C)** Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

[266] 37 U.S.C. § 701(c) provides:

> An enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void.

benefits back to himself by failing to disclose that the Federal Anti-Assignment Acts prohibit the sale or assignment of the pension and disability payments in the first place;

- Misled investors about the potential for an investor to obtain and collect a judgment against a veteran who re-directed his benefits payments to himself by failing to disclose that such payments are exempt from the claims of creditors;
- Deceived investors with the illusion of legality by representing Upstate as "Buyer's Legal Representation" and using Upstate's IOLTA account to deposit the investors' investment funds and to distribute the veteran's monthly payments;
- Failed to disclose to investors the numerous consent orders and cease and desist orders against Gamber and/or his previous company for insurance and securities law violations; and
- Failed to disclose to investors that since June 25, 2013, Respondent Smith has been the subject of an I.R.S. lien for $125,079 in unpaid taxes dating back to 2007 and 2008.[267]

The Smith & Cox Respondents contend that there were no material misrepresentations or omissions attributable to the sales made to their Arizona clients.[268]

1. The Federal Anti-Assignment Acts

The Division asserts that Respondent Smith and Smith & Cox violated A.R.S. §§ 44-1991(A) and 44-3241(A) because they failed to disclose to investors that federal law prohibits the sale or assignment of veterans' pension and disability payments.[269] The Division argues that 38 U.S.C. § 5301(a) prohibits any purported sale or assignment of military benefits for consideration.[270] Similarly, the Division argues that 37 U.S.C. § 701(c) provides that a member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void.[271] The Division notes that, pursuant to 37 U.S.C. § 101(21),[272] the term "pay" includes retirement pay.[273]

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[267] Division's Brief at 60-61.
[268] Smith & Cox Respondents' Response at 4.
[269] Division's Brief at 60.
[270] Division's Brief at 10.
[271] Division's Brief at 11.
[272] 37 U.S.C. § 101(21) provides:

> The term "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

[273] Division's Brief at 11.

The Smith & Cox Respondents contend that there was no assignment of rights in the income stream investments.[274] The Smith & Cox Respondents argue that in order to constitute an assignment, the assignor must manifest an intent to relinquish control over the rights assigned and must actually transfer the rights to the assignee in such a way that the assignee then stands in the shoes of the assignor.[275] The Smith & Cox Respondents argue that the income stream investments could not be assignments, otherwise the sellers would not have been able to unilaterally decide to no longer pay the buyers from their pension income streams.[276] The Smith & Cox Respondents further argue that the Contract for Sale of Payments provides that the income streams are the sole property of the seller and "shall remain under the control of [the] seller."[277] Finally, the Smith & Cox Respondents cite a Bankruptcy case out of the Northern District of Ohio to support their position that the income stream investments are not assignments.[278]

The Division, in its Reply Brief, argues that the Smith & Cox Respondents erroneously rely on common law concepts of an assignment and that 38 U.S.C. § 5301(a)(3)(A) was amended to include a statutory definition of the term "assignment."[279] The Division argues that 38 U.S.C. § 5301 overrides the common law concepts of an assignment and "declares that the agreements at issue here – whereby an investor gives a lump sum of money and buys the right to receive payments from the veteran's pension or benefits – violate the Anti-Assignment Acts."[280] Further, the Division argues that the agreements and related documents contain significant restrictions that rise to the level of assignments.[281] Finally, the Division argues that the transactions at issue here are prohibited assignments and contend that the caselaw, at a minimum, shows a "great risk that the Federal Anti-Assignment Acts might (or actually do) prohibit the sale or assignment of veterans' pension and disability payments."[282]

The Division asserts that Respondent Smith and Smith & Cox should have disclosed to

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[274] Smith & Cox Respondents' Response at 24.
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] Smith & Cox Respondents' Response at 24-25.
[279] Division's Reply at 18.
[280] *Id.*
[281] Division's Reply at 19-22.
[282] Division's Reply at 32.

investors that federal law prohibits the sale or assignment of veterans' pension and disability payments. While we believe that there is a great risk that the Federal Anti-Assignment Acts might prohibit the sale or assignment of veterans' pension and disability payments, we do not reach this conclusion definitively. We note that the SEC Alert only advises that these types of transactions may be prohibited and do not find that the federal courts have determined definitively that the income stream investments at issue are assignments that violate federal statutes. Therefore, we do not find that Respondent Smith and Smith & Cox violated A.R.S. §§ 44-1991(A) and 44-3241(A) for failing to disclose that federal law prohibits the sale or assignment of veterans' pension and disability payments.

We do, however, believe that Respondent Smith and Smith & Cox should have disclosed to investors the significant risk that federal law might prohibit the income stream investments. The evidence shows that potential investors communicated to Smith & Cox that they were interested in a safe and secure investment with minimal risks. Smith & Cox misled these potential investors by touting the income stream investments as safe and secure investments. Smith & Cox stressed that the purchase agreements were binding and enforceable, assured the potential investors that the agreements were vetted by a law firm, and explained to the potential investors that PAC would take over any payments in the event of a default. Accordingly, we find that Respondent Smith and Smith & Cox violated A.R.S. §§ 44-1991(A) and 44-3241(A) because they misled investors by failing to disclose the risk that federal law might prohibit the sale or assignment of veterans' pension and disability payments.

2. Prior Orders Against Gamber

The Division argues that, as a matter of law, the prior orders against Gamber and his former company were material facts that Respondent Smith and Smith & Cox were required to disclose to potential investors.[283] [284] The Division argues that it is no defense that Respondent Smith or Smith & Cox were ignorant of the prior orders against Gamber because A.R.S. § 44-1991(A)(2) is a strict liability statute.[285] [286]

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[283] *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 126 (App. 1986) (holding it was a material omission to fail to disclose that other states had issued cease and desist orders against related companies, principals and officers of the issuers).
[284] Division's Brief at 62.
[285] *Garvin v. Greenbank*, 856 F.2d 1392, 1398 (9th Cir. 1988) ("A seller of securities is strictly liable for the misrepresentations or omissions he makes.").
[286] Division's Brief at 62.

The Smith & Cox Respondents argue that the Division's position that the unadjudicated foreign state consent orders were material and should have been disclosed is without merit and is unreasonable.[287] The Smith & Cox Respondents note that their third party compliance consultant was unable to find any of the orders during his 2013 due diligence and that the Division's own investigator conceded that there was no known central data base available to Respondents or the general public to search for such orders.[288]

We find that prior consent orders against Gamber to be material information that should be disclosed to potential investors. Because A.R.S. § 44-1991(A)(2) is a strict liability statute, we find that the Smith & Cox Respondents' argument that they were unable, despite due diligence, to learn of the consent orders to be unpersuasive. Accordingly, we find that Respondent Smith and Smith & Cox violated A.R.S. §§ 44-1991(A) and 44-3241(A) because they failed to disclose to investors the prior orders against Gamber and his former company.

3. June 2013 Tax Lien Against Respondent Smith

The Division argues that Respondent Smith's tax liens were material facts because they raise questions concerning his competence, skill, and judgment in financial matters.[289] The Smith & Cox Respondents do not dispute this and admit that Respondent Smith did not disclose his federal tax liens to anyone, including Cox.[290] We find that the tax liens against Respondent Smith are material facts that speak to Respondent Smith's competence and judgment in financial matters. Accordingly, we find that Respondent Smith and Smith & Cox violated A.R.S. §§ 44-1991(A) and 44-3241(A) because they failed to disclose to investors that since June 25, 2013, Respondent Smith has been the subject of an I.R.S. lien for $125,079 for unpaid taxes dating back to 2007 and 2008.

4. Conclusion

We find that Respondent Smith and Smith & Cox violated A.R.S. §§ 44-1991(A) and 44-3241(A) because they misled investors and failed to disclose the risk that federal law prohibits the sale or assignment of veterans' pension and disability payments, they failed to disclose to investors the prior

[287] Smith & Cox Respondents' Response at 25.
[288] Smith & Cox Respondents' Response at 25-26.
[289] Division's Brief at 62.
[290] Smith & Cox Respondents' Response at 4.

orders against Gamber and his former company, and they failed to disclose to investors that since June 25, 2013, Respondent Smith has been the subject of an I.R.S. lien for $125,079 for unpaid taxes dating back to 2007 and 2008.

C. Control Person Liability

Under A.R.S. § 44-1999(B), "Every person who, directly or indirectly, controls any person liable for a violation of section 44-1991 or 44-1992 is liable jointly and severally with and to the same extent as the controlled person to any person to whom the controlled person is liable unless the controlling person acted in good faith and did not directly or indirectly induce the act underlying the action." For the purposes of A.R.S. § 44-1999(B), a person may include an individual, corporation or limited liability company.[291]

The Division contends that Respondent Smith and Cox are liable as control persons for Smith & Cox's securities fraud violations.[292] The Division notes that Respondent Smith and Cox each own fifty percent of Smith & Cox and that they share management responsibilities "about 60/40," with Respondent Smith doing the sixty percent and Cox doing the forty percent.[293] The Division contends that, as the two members and managers of Smith & Cox, Respondent Smith and Cox each had the legal power to control its activities.[294]

The Smith & Cox Respondents do not dispute that Respondent Smith should be liable as a control person for Smith & Cox. Rather, they argue that Cox should not be held liable. Specifically, the Smith & Cox Respondents argue that Cox should not be held liable as a control person for Smith & Cox because he "acted in good faith and did not directly or indirectly induce the act underlying the action."[295] [296] "To prevail using this defense, the controlling person must demonstrate both good faith and lack of inducement."[297]

The Smith & Cox Respondents argue that in order to satisfy the good faith prong of the good faith defense, "controlling persons must establish that they exercised due care by taking reasonable

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[291] A.R.S. § 44-1807(17).
[292] Division's Brief at 62.
[293] Division's Brief at 63.
[294] Division's Brief at 63-64.
[295] A.R.S. § 44-1999(B).
[296] Smith & Cox Respondents' Response at 26.
[297] *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 413 (App. 2003).

steps to 'maintain and enforce a reasonable and proper system of supervision and internal control[s].'"[298] [299] The Smith & Cox Respondents contend that Smith & Cox is a two-man insurance and investment advisory firm, in which Cox is licensed only to sell insurance policies and Respondent Smith is the only person licensed to provide investment advice and sell securities.[300] The Smith & Cox Respondents argue that the record shows Smith & Cox took specific precautions to ensure compliance with securities laws and that Cox himself made specific efforts to ensure the precautions were in place.[301] Specifically, the Smith & Cox Respondents argue that Smith & Cox retained compliance experts and ran all its marketing pieces and products through its outside compliance consultants, that Smith & Cox retained the services of Mr. Smith to research the income stream investments, and that Cox, having run through precautionary measures individually and having received assurances from Respondent Smith that he fully vetted the product and associated persons, exercised due care and had no reason to question Respondent Smith's decision to offer the product for sale.[302]

The Smith & Cox Respondents argue that in order to satisfy the second prong of the good faith defense, controlling persons must demonstrate that they did not directly or indirectly induce the act underlying that action.[303] The Smith & Cox Respondents contend that Arizona courts have held that inducement connotes an active role and requires engaging in purposeful persuasive effort.[304] [305] The Smith & Cox Respondents argue that Cox did not induce the alleged violations of the Securities Act because he took no active role in persuading or prevailing on investors to purchase the income stream investments.[306] Specifically, the Smith & Cox Respondents argue that Cox is a licensed insurance agent who did not sell securities or similar products, and that while he was present in the initial meetings with clients in which Respondent Smith first introduced the product, Cox was not present at the follow-up meetings Respondent Smith had with clients regarding the income stream investments.[307]

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[298] *Eastern Vanguard*, 206 Ariz. at 414 (internal citations omitted).
[299] Smith & Cox Respondents' Response at 27.
[300] Smith & Cox Respondents' Response at 28.
[301] *Id.*
[302] Smith & Cox Respondents' Response at 28-32.
[303] Smith & Cox Respondents' Response at 32.
[304] *See Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 22 (App. 1996).
[305] Smith & Cox Respondents' Response at 33.
[306] Smith & Cox Respondents' Response at 34.
[307] Smith & Cox Respondents' Response at 34-35.

The Division, in its Reply, contends that A.R.S. § 44-1999(B) imposes presumptive liability "on those persons who have the *power* to directly or indirectly control the activities of those persons or entities liable as primary violators of A.R.S. § 44-1991" and that it "does not require actual participation in the wrongful conduct. . ."[308] [309] The Division argues that Cox had the legal power to control Smith & Cox's activities and that whether or not Cox ever exercised his legal power is immaterial.[310] As such, the Division argues, Cox is a controlling person of Smith & Cox.[311]

The Division contends that Cox has failed to prove the good faith prong of the good faith defense.[312] First, the Division contends that, in 2009, Cox learned that the Indiana Department of Insurance disciplined Respondent Smith because Respondent Smith had sold unregistered securities that he did not think at the time were securities.[313] The Division argues that Cox was on notice that in the past Respondent Smith had misjudged whether an investment was a security, and that despite this knowledge Cox relied on Respondent Smith's judgment of whether to sell the income stream investments instead of insisting that the firm consult with independent counsel.[314] Second, the Division contends that Cox did not meet his burden, as required by *Eastern Vanguard*, to prove that Smith & Cox maintained and enforced a reasonable and proper system of supervision and internal control.[315][316] The Division argues that Respondents did not produce a compliance policies and procedures manual or testify about any system of supervision and internal control.[317] Rather, the Division argues that Respondents relied on "two field marketing offices" and Mr. Smith to investigate the income stream investment products.[318] The Division contends that Mr. Smith made clear he did not approve Smith & Cox to sell the income stream investments and advised of the potential dangers in selling the income stream investments.[319] The Division argues that despite the warnings of Mr. Smith and the red flags

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[308] *Eastern Vanguard*, 206 Ariz. at 412 (emphasis in original).
[309] Division's Reply at 34.
[310] *Id.*
[311] *Id.*
[312] Division's Reply at 35-45.
[313] Division's Reply at 36.
[314] Division's Reply at 36-37.
[315] *Eastern Vanguard*, 206 Ariz. at 414.
[316] Division's Reply at 37.
[317] *Id.*
[318] *Id.*
[319] Division's Reply at 38.

contained in the SEC Alert, Cox simply entrusted the determination to sell the income stream investments to Respondent Smith, who was not qualified to make such a determination.[320]

The Division contends that Cox has failed to prove the non-inducement prong of the good faith defense.[321] The Division contends that inducement occurs when, through their acts and omissions, the sellers encourage the investor to purchase the security.[322] [323] The Division argues that Smith & Cox's marketing brochure touted its expertise and skill and that Cox should not be allowed to disown those assurances to investors found in his own marketing brochure.[324] The Division further argues that Cox was present during Respondent Smith's presentation of the income stream investments to potential investors, which induced investors to purchase the income stream investments, and that Cox's presence was an endorsement of Respondent Smith's presentation.[325] Finally, the Division argues that Cox knew that Respondent Smith's presentation did not include advising potential investors of the SEC Alert and that Cox, at a minimum, sat silently by while Respondent Smith made assurances to Mr. Hebb and other potential investors that the income streams were "one of the safest investments they had, that it was totally vetted."[326]

Based on the totality of evidence, we find that Cox failed to meet his burden of satisfying the good faith exception of A.R.S. § 44-1999(B). Cox, as a manager and fifty percent owner of Smith & Cox, has the power to control the activities of Smith & Cox. Cox was aware of the warnings of the SEC Alert and knew of the risks associated with the income stream investments. Cox was present during Respondent Smith's presentation of the income stream investments to potential investors and knew that the presentation did not include the SEC Alert or mention of the risks associated with the income stream investments. Indeed, the presentation relayed the opposite sentiment, that the income stream investments were safe and secured investments and totally vetted. We find that Cox failed to satisfy his burden of proving that the good faith exception of A.R.S. § 44-1999(B) applies. Accordingly, we find that Cox is a control person of Smith & Cox and that Respondent Smith and Cox

[320] Division's Reply at 41-44.
[321] Division's Reply at 45-47.
[322] *Grand v. Nacchio*, 225 Ariz. 171, 176 (2010).
[323] Division's Reply at 45.
[324] Division's Reply at 46.
[325] *Id.*
[326] Division's Reply at 46-47.

are jointly and severally liable to the same extent as Smith & Cox for its violations of A.R.S. § 44-1991(A).

D. Respondent Mark Corbett

Corbett is a California resident who has never been registered by the Commission as a securities salesman or dealer.[327] The Division contends that Corbett identified veterans who were willing to sell a portion of their military pension payments or veteran's disability benefit payments to investors in exchange for a lump sum payment.[328] The Division notes that Corbett is listed as the "Vendor" in the Sales Assistance Agreements for 48 of the investors and received commissions of at least $23,899.96.[329]

The Division argues that Corbett is liable for 48 of Respondents' unlawful sales because he participated in them within the meaning of A.R.S. § 44-2003(A).[330] [331] As such, the Division argues that Corbett should be jointly and severally liable for the 48 investments totaling $2,487,509.82.[332]

Corbett did not appear at the hearing or otherwise contest the Division's allegations.

Based on the evidence presented, we find that Corbett should be jointly and severally liable for the 48 investments he participated in for a total of $2,487,509.82.

E. Marital Community Liability

The Division contends that the liabilities incurred by Respondent Smith and Cox from their violations of the Securities and IM Acts are liabilities of their respective marital communities.[333]

The Commission has the authority to join a spouse in an action to determine the liability of the marital community.[334] With limited exceptions, all property acquired by either the husband or the wife

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[327] Exhs. S-4 and S-149.
[328] Division's Brief at 64.
[329] Division's Brief at 65; Exhs. S-60 and S-108.
[330] A.R.S. § 44-2003(A) provides:

> Subject to the provisions of this section, an action brought under section 44-2001, 44-2002 or 44-2032 may be brought against any person, including any dealer, salesman or agent, who made, participated in or induced the unlawful sale or purchase, and such persons shall be jointly and severally liable to the person who is entitled to maintain such action. No person shall be deemed to have participated in any sale or purchase solely by reason of having acted in the ordinary course of that person's professional capacity in connection with that sale or purchase.

[331] Division's Brief at 64-65.
[332] Division's Brief at 65.
[333] Division's Brief at 72-73.
[334] A.R.S. § 44-2031(C) provides:

during marriage is the community property of both husband and wife.[335] The Arizona Supreme Court has found that "the presumption of law is, in the absence of the contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community."[336]

Under A.R.S. § 25-214(B), spouses have "equal management, control and disposition rights over their community property and have equal power to bind the community."[337] Either spouse may contract debts or otherwise act for the benefit of the community except as prohibited under A.R.S. §

The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community. This subsection does not authorize the commission to join any individual who is divorced from the defendant at the time an action authorized by this chapter is filed.

A.R.S. § 44-3291(C) provides:

The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community. This subsection does not authorize the commission to join any individual who is divorced from the defendant at the time an action authorized by this chapter is filed.

[335] A.R.S. § 25-211 provides:

A. All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is:

1. Acquired by gift, devise or descent.
2. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or annulment does not:

1. Alter the status of preexisting community property.
2. Change the status of community property used to acquire new property or the status of that new property as community property.
3. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed pursuant to section 25-315, subsection A, paragraph 1, subdivision (a).

[336] *Johnson v. Johnson*, 131 Ariz. 38, 45, (1981), citing *Benson v. Hunter*, 23 Ariz. 132, 134-35, (1921).

[337] A.R.S. § 25-214 provides:

A. Each spouse has the sole management, control and disposition rights of each spouse's separate property.

B. The spouses have equal management, control and disposition rights over their community property and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.
2. Any transaction of guaranty, indemnity or suretyship.
3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

25-214.[338] "[A] debt is incurred at the time of the actions that give rise to the debt."[339] "In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation."[340] "A debt incurred by a spouse during marriage is presumed to be a community obligation; a party contesting the community nature of a debt bears the burden of overcoming that presumption by clear and convincing evidence."[341]

Respondent Smith and Kimberly Ann Smith have been married during the relevant time-period, as has Cox and Beth Cox. The Division contends that both Respondent Smith and Cox used at least some of their income from Smith & Cox between 2013 and 2105 to pay their and their wives' living expenses.[342] The Smith & Cox Respondents do not contest that the marital community is liable, and therefore failed to rebut the presumption that a debt incurred during marriage is a community obligation. Accordingly, we find that the marital communities of Respondent Smith and Kimberly Ann Smith, and of Cox and Beth Cox, are subject to liability resulting from this proceeding.

F. Remedies

The Division argues that grounds exist to revoke Respondent Smith's license as an investment adviser representative and Smith & Cox's license as an investment adviser pursuant to A.R.S. § 44-3201(A)(1)[343] because it is in the public interest and because their licensure application and

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[338] A.R.S. § 25-215 provides:

> A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent agreement of the property owner to the contrary.
> B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single.
> C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state.
> D. Except as prohibited in section 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

[339] *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111 (App. 2008).
[340] A.R.S. § 25-215(D).
[341] *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92 (App. 1995).
[342] Division's Brief at 73.
[343] A.R.S. § 44-3201(A)(1) provides:

> A. After a hearing or notice and an opportunity for a hearing as provided in article 7 of this chapter, the commission may enter an order suspending for a period of not more than one year, denying or

supplemental amendments are incomplete, inaccurate, or misleading. Furthermore, the Division asserts that Respondents are liable to pay restitution and administrative penalties for their violations of the Securities and IM Act.

1. Revocation

Under A.R.S. § 44-3201(A)(1), the Commission may enter an order suspending for a period of not more than one year, denying, or revoking the license of an investment adviser or an investment adviser representative if the Commission finds it is in the public interest and the application for licensure of the investment adviser or investment adviser representative, any financial statement, document or other exhibit filed with an application or any supplement or amendment to an application is incomplete, inaccurate, or misleading. The Division contends that Respondent Smith and Smith & Cox were required to file, pursuant to A.R.S. § 44-3159(A)(1),[344] a supplemental statement showing any material changes in the facts contained in the original application for licensure.[345]

The Division argues that the June 25, 2013, tax lien against Respondent Smith for $125,079 in unpaid income taxes from 2007 and 2008 was a material change to the facts stated in the Form U4 that Respondent Smith and Smith & Cox filed on January 29, 2009, and the amended Form U4 they filed on July 25, 2011.[346] Likewise, the Division argues that the June 25, 2013, tax lien was a material change to the facts stated in the amendments to the Form ADV filed by Respondent Smith, on behalf of Smith & Cox, on September 13, 2013, February 20, 2014, February 2, 2016, and April 7, 2016.[347] Because they have not amended their Form U4 or Form ADV to disclose the unsatisfied $125,079 tax lien against Respondent Smith, the Division argues that Respondent Smith's and Smith & Cox's

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revoking the license of an investment adviser or investment adviser representative if the commission finds that it is in the public interest and any one or a combination of the following:

1. The application for licensure of the investment adviser or investment adviser representative, any financial statement, document or other exhibit filed with an application or any supplement or amendment to an application is incomplete, inaccurate or misleading.

[344] A.R.S. § 44-3159(A)(1) provides:

A. In order to retain licensure, licensed investment advisers and investment adviser representatives shall file the following with the commission through the IARD:

1. A supplemental statement showing any material changes in the facts contained in the original application for licensure as supplemented or amended as the changes occur or within thirty days after the change.

[345] Division's Brief at 65-66.

[346] Division's Brief at 66.

[347] *Id.*

licensure applications are incomplete, inaccurate or misleading.[348]

Finally, the Division argues that revocation is in the public interest for three main reasons.[349] First, the Division contends that as an investment advisor, Respondent Smith and Smith & Cox pose a grave danger to the public because instead of providing a "secured cash flow," they misrepresented material facts to sell the income stream investments which caused "devastating wreckage" on their investors' retirements.[350] Second, the Division argues that Respondent Smith cannot manage his own finances well enough to pay off a $ 93,000 judgment against him from 2006 or to pay off the tax lien for his unpaid taxes.[351] The Division contends that, considering his inability to manage his own finances, the Commission should not allow Respondent Smith or Smith & Cox to retain their licenses to advise others how to manage their finances.[352] Third, the Division argues that revoking Respondent Smith's and Smith & Cox's licenses will deter others in the securities industry from engaging in similar dishonest, unethical and fraudulent misconduct.[353]

The Smith & Cox Respondents do not respond or contest the Division's contention that revocation of Respondent Smith's and Smith & Cox's license is warranted.

Under the circumstances, and considering all the allegations and evidence, we find that revocation of Respondent Smith's and Smith & Cox's licenses is in the public's best interest.

2. Restitution

The Commission has the authority to order restitution pursuant to A.R.S. §§ 44-2032(1)[354] and

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[348] Division's Brief at 67.
[349] Division's Brief at 68.
[350] *Id.*
[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] A.R.S. § 44-2032(1) provides:

> If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission, in its discretion may:
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> > 1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including, without limitation, a requirement to provide restitution as prescribed by rules of the commission. …

44-3292(1).[355] The Division contends that it was established at the hearing that 21 investors collectively paid $2,776,952.62 for the 53 investments.[356] Because it was also established at the hearing that Mr. McLeod received repayment of $181,849.24 and Mr. Hebb received repayment of approximately $21,000.00, the Division credited those amounts back to Respondents and argues that the total restitution amount for the Smith & Cox Respondents is $2,574,103.38.[357] Further, the Division contends that Corbett participated in 48 sales for which the investors, including Mr. McLeod and Mr. Hebb, collectively paid $2,487,509.82.[358] After subtracting the offsets for Mr. McLeod's and Mr. Hebb's repayments, the Division argues that the total restitution amount for Corbett is $2,284,660.58.[359] Finally, the Division notes that, pursuant to A.A.C. R14-4-308(C)(4), Respondents will be entitled to receive credits for any repayments they can verify the investors received, but that it is incumbent on Respondents that they do so.[360]

The Smith & Cox Respondents argue that the restitution requested by the Division is unreasonable and unjustified under these circumstances.[361] The Smith & Cox Respondents contend that the Division is aware that each of Respondents' clients has been partially repaid and that the total amount should be deducted from the consideration (including interest) under A.A.C. R14-4-308(C).[362] The Smith & Cox Respondents argue, however, that the Division is only applying deductions from two of the 21 clients.[363] The Smith & Cox Respondents further argue that the payment records are under the control of Upstate, which acted as the escrow for all payment transactions, and that the Division

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[355] A.R.S. § 44-3292(1) provides:

> If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter or any rule or order of the commission adopted or issued under this chapter, the commission may:
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> 1. Issue an order directing the person to cease and desist from engaging in the act, practice or transaction, or doing any act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including a requirement to provide restitution as prescribed by rules of the commission. …

[356] Division's Brief at 70.
[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] *Id.*
[361] Smith & Cox Respondents' Response at 36-37.
[362] Smith & Cox Respondents' Response at 36.
[363] Smith & Cox Respondents' Response at 36-37.

failed or chose not to obtain those records before Upstate was dismissed from this matter prior to hearing.[364] Finally, the Smith & Cox Respondents request further proceedings if the Commission is inclined to award restitution in this matter because the resulting amount of the order would be severely disproportionate to the actual unpaid amounts.[365]

The Division, in its Reply Brief, argues that the Smith & Cox Respondents do not challenge the amounts the investors placed into the income stream investments.[366] Rather, the Division argues that the Smith & Cox Respondents' only dispute the amount that should be subtracted from the restitution total because "each of Respondents' clients has been partially repaid."[367] The Division contends that when actual evidence of repayment exists, the Division has credited Respondents with that payment.[368] The Division argues that repayment is an affirmative defense and that it was the Respondents' burden to prove repayment.[369]

We find that the evidence in this matter shows that the total restitution amount for the Smith & Cox Respondents is $2,574,103.38 and the total restitution amount for Corbett is $2,284,660.58. If Respondents can prove investors have received additional repayments, Respondents can provide such proof to the Commission and the Commission will offset those amounts from the total restitution awarded. Accordingly, we find that the Smith & Cox Respondents, including their marital communities, should pay restitution in the amount of $2,574,103.38, and that Corbett should pay restitution in the amount of $2,284,660.58, jointly and severally.

3. Administrative Penalties

Under A.R.S. § 44-2036(A), the Commission has authority to assess an administrative penalty of no more than $5,000 for each violation of the Securities Act committed.[370] The Division alleges that Respondent Smith and Smith & Cox participated in or induced 53 unlawful sales, resulting in 159

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[364] Smith & Cox Respondents' Response at 37.
[365] *Id.*
[366] Division's Reply at 48.
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] A.R.S. § 44-2036(A) provides:

> A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.

violations of the Securities Act (53 violations of A.R.S. § 44-1841, 53 violations of A.R.S. § 44-1842, and at least 53 violations of A.R.S. § 44-1991(A)).[371] As such, the Division argues that Respondent Smith and Smith & Cox should each pay an administrative penalty of $795,000.00, of which $265,000.00 should be imposed for their violations of A.R.S. § 44-1991(A).[372] Further, the Division alleges that, as a control person under A.R.S. § 44-1999(B), Cox should be ordered to pay jointly and severally with Smith & Cox its administrative penalty of $265,000.00 with respect to Smith & Cox's violations of A.R.S. § 44-1991.[373]

Under A.R.S. § 44-3296, the Commission has authority to assess an administrative penalty of no more than $1,000 for each violation of the IM Act committed.[374] The Division alleges that Respondent Smith and Smith & Cox committed at least 53 violations of the IM Act.[375] As such, the Division argues that Respondent Smith and Smith & Cox should each pay an administrative penalty of $53,000.00.[376]

The Division alleges that Corbett participated in 48 unlawful sales, resulting in 144 violations of the Securities Act (48 violations of A.R.S. § 44-1841, 48 violations of A.R.S. § 44-1842, and at least 48 violations of A.R.S. § 44-1991(A)).[377] As such, the Division argues that Corbett should pay an administrative penalty of $720,000.00.[378]

The Smith & Cox Respondents argue that the administrative penalties requested by the Division

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[371] Division's Brief at 71.
[372] *Id.*
[373] *Id.*
[374] A.R.S. § 44-3296 provides:

> A. A person who, in an administrative action, is found to have violated this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, of not more than one thousand dollars for each violation.
> B. Any administrative penalties collected pursuant to this section shall be deposited, pursuant to sections 35-146 and 35-147, in the state general fund.
> C. If judicial review has not been sought under title 12, chapter 7, article 6, a certified copy of any commission order requiring the payment of restitution or administrative penalties may be filed in the office of the clerk of the superior court in any county of this state. The clerk shall treat the commission order in the same manner as a judgment of the superior court. A commission order so filed has the same effect as a judgment of the superior court and may be recorded, enforced or satisfied in like manner. No filing fee is required under this section.

[375] Division's Brief at 71.
[376] Division's Brief at 71-72.
[377] Division's Brief at 72.
[378] *Id.*

are unreasonable and unjustified under these circumstances.[379] The Smith & Cox Respondents contend that their conduct was unintentional, that many of their clients have been repaid over 60% of their initial payment, that only a few clients have expressed disappointment or lodged a complaint against them, and that they acted in good faith and due diligence prior to selling the income stream investments. As such, the Smith & Cox Respondents request that the Commission waive or significantly reduce the administrative penalties sought by the Division.[380]

The Division, in its Reply Brief, disputes that Respondents' conduct was unintentional and argues that there is no evidence to support the Smith & Cox Respondents' contention that many of their clients have been repaid over 60% of their initial payment. The Division characterizes Respondents' conduct as reprehensible and argues that despite the SEC Alert, and despite the fact that Mr. Smith advised against selling the income stream investments, and despite the fact that Respondent Smith had previously been sued for selling a similar "alternative" investment, Respondents decided to sell the income stream investments, resulting in the betrayal of their clients' trust and the loss of millions of their clients' monies.

We find that the evidence shows that Respondents' conduct was intentional and warrants administrative penalties. The evidence shows that potential investors communicated to Smith & Cox that they were interested in a safe and secure investment with minimal risks and that Smith & Cox misled these potential investors by touting the income stream investments as safe and secure investments. We find that Smith & Cox misled their potential investors when they stressed that the purchase agreements were binding and enforceable, assured the potential investors that the agreements were vetted by a law firm, and explained to the potential investors that PAC would take over any payments in the event of a default.

We believe that under the circumstances of this case, calculating administrative penalties based on the number of investors is appropriate and reasonable. Accordingly, based on 21 investors, we find that Smith & Cox, Respondent Smith, Cox, and Corbett each pay an administrative penalty of $105,000.00 for their Securities Act violations and that Smith & Cox and Respondent Smith each pay

[379] Smith & Cox Respondents' Response at 36-37.
[380] Smith & Cox Respondents' Response at 37.

an administrative penalty of $21,000.00 for their IM Act violations.

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Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. Smith & Cox was organized on January 15, 2009, as an Arizona limited liability company.[381] From July 13, 2009, to the present, Smith & Cox has been licensed by the Commission as an investment adviser.[382]

2. From July 13, 2009, to the present, Respondent Smith has been licensed by the Commission as an investment adviser representative.[383] Respondent Smith is a managing member of Smith & Cox and its Chief Compliance Officer.[384]

3. Kimberly Ann Smith has been married to Respondent Smith for 37 years.[385]

4. Since at least January 29, 2009, Cox has been a member of Smith & Cox.[386]

5. Beth Cox has been married to Cox since at least 2007.[387]

6. Respondent Smith and Cox each own fifty percent of Smith & Cox.[388] They share management responsibilities "about 60/40," with Respondent Smith doing the sixty percent and Cox doing the forty percent.[389]

7. Respondent Smith used income from Smith & Cox to pay his and Kimberly Ann Smith's living expenses.[390]

8. Cox used at least some of his income from Smith & Cox to pay his and Beth Cox's living expenses.[391]

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[381] Exh. S-15.
[382] Exh. S-16.
[383] Exh. S-17.
[384] Exh. S-25; Tr. 797:11-13.
[385] Exh. S-7(a).
[386] Exh. S-25.
[387] Tr. 793:8-14.
[388] Tr. 816:12-15.
[389] Tr. 816:16-24.
[390] Tr. 793:8-14.
[391] Tr. 796:2-21.

9. BAIC is (or was) a Texas for-profit corporation[392] and SoBell is (or was) a Mississippi for-profit corporation[393] that was appointed by the veterans as the veterans' agent within the structure of the income stream investments.[394]

10. Gamber is (or was) the President of BAIC[395] and the incorporator of SoBell.[396]

11. On April 14, 2008, the Arkansas Insurance Commissioner entered a Consent Order against Gamber, under which his insurance producer's license was suspended for 2 years and he was ordered to pay an administrative penalty.[397]

12. On July 1, 2009, the Arkansas Insurance Commissioner entered a Consent Order against Gamber, under which he surrendered his Arkansas insurance producer's license, agreed he could not reapply for licensure for 3 years, and agreed to pay a $25,000 administrative penalty.[398]

13. On April 22, 2013, the Arkansas Securities Commissioner entered a Cease and Desist Order against Gamber and VFG for selling unregistered securities involving military retirement income streams.[399]

14. On September 20, 2013, the Iowa Insurance Commissioner entered a Consent Order against Gamber and VFG, under which they were ordered to cease and desist from violating Iowa's securities laws.[400]

15. On December 10, 2013, the Securities Division of the New Mexico Regulation and Licensing Department entered a Cease and Desist Order against VFG, finding that it deceived investors by describing the sale of income streams from veterans' pensions and disability benefits as valid and permissible transactions, and by omitting the fact that the assignment of these income streams are prohibited by federal law.[401]

16. On March 18, 2014, the Arkansas Securities Commissioner entered a Cease and Desist

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[392] Exh. S-8.
[393] Exh. S-9.
[394] *See, e.g.,* Exh. S-79.
[395] Exh. S-8.
[396] Exh. S-9.
[397] Exh. S-38.
[398] Exh. S-39.
[399] Exh. S-40.
[400] Exh. S-41.
[401] Exh. S-42.

Order against VFG for violating the registration and antifraud provisions of the Arkansas Securities Act.[402]

17. On May 9, 2014, Pennsylvania's Department of Banking and Securities entered a Consent Order against VFG, which Gamber signed on VFG's behalf, for violating the antifraud provision of the Pennsylvania's Securities Act of 1972.[403]

18. On June 23, 2014, the Arkansas Securities Commissioner entered a Consent Order against Gamber and VFG for violating the registration and antifraud provisions of the Arkansas Securities Act.[404]

19. On August 26, 2014, Florida's Office of Financial Regulation entered a Final Order against VFG for selling military retirement income streams as unregistered securities.[405]

20. On November 7, 2014, California's Department of Business Oversight entered a Desist and Refrain Order against VFG for selling military retirement income streams as unregistered securities in violation of the antifraud provision in Section 25401 of the California Corporate Securities Law of 1968.[406]

21. Respondents failed to disclose to investors any of the foregoing consent orders and cease and desist orders against Gamber or VFG for insurance and securities law violations.[407]

22. Respondent Smith has not satisfied a $93,000 judgment from 2006 that he owes to an investor in Indiana.[408]

23. On June 25, 2013, the I.R.S. recorded a Notice of Federal Tax Lien in Pima County against Respondent Smith for $125,079 in unpaid taxes from 2007 and 2008.[409] Respondent Smith has never satisfied the I.R.S.'s $125,079 lien.[410]

24. On August 2, 2016, the I.R.S. recorded a Notice of Federal Tax Lien in Pima County

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[402] Exh. S-43.
[403] Exh. S-44.
[404] Exh. S-45.
[405] Exh. S-46.
[406] Exh. S-47.
[407] Exh. S-7(a).
[408] Tr. 564:3-565:4; Exh. S-7(a).
[409] Exh. S-26.
[410] Tr. 568:6-12; Tr. 988:23-989:1; Exh. S-7(a); Amended Answer at ¶ 67.

against Respondent Smith for $9,594 in unpaid taxes from 2014.[411] Respondent Smith has never satisfied the I.R.S.'s $9,594 lien.[412]

25. On August 29, 2017, the I.R.S. recorded a Notice of Federal Tax Lien in Pima County against Respondent Smith for $43,602 in unpaid taxes from 2009.[413] Respondent Smith has never satisfied the I.R.S.'s $43,602 lien.[414]

26. On January 29, 2009, Respondent Smith filed a Form U4 with the Commission to become an Arizona-licensed investment adviser representative[415] and a Form ADV, on behalf of Smith & Cox, for Smith & Cox to become an Arizona-licensed investment adviser.[416]

27. On July 25, 2011, Respondent Smith filed a Form U4 Amendment.[417]

28. The Form U4, the Form U4 Amendment, and the Form ADV ask, "Do you have any unsatisfied judgments or liens against you?"[418] On all three occasions Respondent Smith erroneously answered "No" because he had not satisfied the $93,000 judgment from 2006.[419]

29. On September 13, 2013, February 20, 2014, February 2, 2016, and April 7, 2016, Respondent Smith, on behalf of Smith & Cox, filed Smith & Cox's Form ADV Amendments.[420]

30. The Form ADV Amendments ask, "Are there any unsatisfied judgments or liens against you, any advisory affiliate, or any management person?"[421] On all four occasions Respondent Smith erroneously answered "No" because he had not satisfied the $93,000 judgment from 2006 and because of the June 25, 2013, unsatisfied tax lien against Respondent Smith.[422]

31. Respondent Smith has never updated his Form U4 or Smith & Cox's Form ADV to disclose that he has not satisfied a $93,000 judgment against him or to disclose the I.R.S.'s 2013, 2016, and 2017 unsatisfied liens against him for unpaid taxes.[423]

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[411] Exh. S-27.
[412] Tr. 574:11-575:2; Amended Answer at ¶ 76.
[413] Exh. S-28.
[414] Tr. 576:8-14; Amended Answer at ¶ 78.
[415] Exh. S-20.
[416] Exh. S-19.
[417] Exh. S-21.
[418] Exhs. S-19, S-20, and S-21.
[419] *Id.*
[420] Exhs. S-22, S-23, S-24, and S-25.
[421] *Id.*
[422] *Id.*
[423] Tr. 564:3-565:4; Tr. 578:20-579:10; Exh. S-7(a).

32. Respondents failed to disclose to investors that the Federal Anti-Assignment Acts might prohibit the sale or assignment of veterans' pension and disability payments.

33. Respondents misled investors by touting that the income stream investments are safe and secure investments and totally vetted.

34. Smith & Cox sold 53 income stream investments to 21 individual investors totaling $2,776,952.62.[424]

35. Corbett participated in 48 sales of the income stream investments to 21 individual investors totaling $2,487,509.82.[425]

36. At least two of the investors received a partial return on their investments totaling $202,849.24.[426]

37. These findings of fact are based upon the Discussion above, and those findings are also incorporated herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this matter pursuant to Article XV of the Arizona Constitution and A.R.S. § 44-1801, *et. seq*.

2. The findings contained above are incorporated herein.

3. The income stream investments are securities pursuant to A.R.S. § 44-1801(27) because the investments consisted of investment contracts, evidences of indebtedness, and notes.

4. Respondents offered and sold securities in Arizona within the meaning of A.R.S. § 44-1801.

5. Respondent Smith and Smith & Cox violated A.R.S. § 44-1841 by offering and selling unregistered securities in Arizona.

6. Respondent Smith and Smith & Cox violated A.R.S. § 44-1842 by offering and selling securities in Arizona while not being registered as dealers or salesmen.

7. Respondent Smith and Smith & Cox committed fraud in the offer and sale of securities in violation of A.R.S. §§ 44-1991(A) and 44-3241(A).

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[424] Exh. S-50.
[425] *Id.*
[426] Tr. 459:15; Tr. 460:17-19; Tr. 143:6-10; Tr. 170:8-10.

8. Respondent Smith and Cox directly or indirectly controlled Smith & Cox, within the meaning of A.R.S. § 44-1999, and are jointly and severally liable with Smith & Cox, for violations of A.R.S. § 44-1991.

9. Cox failed to meet his burden of proof, pursuant to A.R.S. § 44-1999(B), to establish a good faith defense from control person liability.

10. Respondents' conduct is grounds for a cease and desist order to cease and desist violating the Securities Act pursuant to A.R.S. § 44-2032.

11. Respondent Smith's and Smith & Cox's conduct is grounds for a cease and desist order to cease and desist violating the IM Act pursuant to A.R.S. §§ 44-3201 and 44-3292.

12. Respondents' conduct is grounds for an order of restitution pursuant to A.R.S. § 44-2032 and A.A.C. R14-4-308, for which the respective marital communities of Respondent Smith and Kimberly Ann Smith, and Cox and Beth Cox, should be jointly and severally liable subject to the limitations of A.R.S. § 25-215.

13. Respondents' conduct is grounds for an order of administrative penalties pursuant to A.R.S. § 44-2036, for which the respective marital communities of Respondent Smith and Kimberly Ann Smith, and Cox and Beth Cox, should be jointly and severally liable subject to the limitations of A.R.S. § 25-215.

14. Respondent Smith's conduct is grounds for revocation of his investment adviser representative license pursuant to A.R.S. § 44-3201.

15. Smith & Cox's conduct is grounds for revocation of its investment adviser license pursuant to A.R.S. § 44-3201.

ORDER

IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-2032, Respondents Mark Corbett, Smith & Cox, LLC, William Andrew Smith, and Christopher Spence Cox shall cease and desist from violating the Arizona Securities Act.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. §§ 44-3201 and 44-3292, Respondents Smith & Cox, LLC and William Andrew Smith shall cease and desist from violating the Arizona Investment Management Act.

IT IS FURTHER ORDERED that, pursuant to the authority granted to the Commission under A.R.S. §§ 44-2032, 44-1999, 44-2003, and 44-2031, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law, Respondents Smith & Cox, LLC, William Andrew Smith, and Christopher Spence Cox, as their sole and separate obligations, and William Andrew Smith and Kimberly Ann Smith, and Christopher Spence Cox and Beth Cox, as a community obligation, jointly and severally with former Respondents BAIC, Inc., SoBell Corp, and Andrew Gamber, shall pay restitution in the principal amount of $2,574,103.38, payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that, pursuant to the authority granted to the Commission under A.R.S. §§ 44-2032 and 44-2003, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law, Respondent Mark Corbett, jointly and severally with Smith & Cox, LLC, William Andrew Smith, Christopher Spence Cox, the respective marital communities of William Andrew Smith and Kimberly Ann Smith, and Christopher Spence Cox and Beth Cox, and former Respondents BAIC, Inc., SoBell Corp, and Andrew Gamber, shall make restitution in the principal amount of $2,284,660.58, payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that, pursuant to the authority granted to the Commission under A.R.S. §§ 44-3201, 44-3291, and 44-3292, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law, Respondents Smith & Cox, LLC, and William Andrew Smith, as his sole and separate obligation, and William Andrew Smith and Kimberly Ann Smith, as a community obligation, shall pay restitution in the principal amount of $2,574,103.38, payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that all ordered restitution payments shall be deposited into an interest-bearing account(s), if appropriate, until distributions are made.

IT IS FURTHER ORDERED that the ordered restitution shall bear interest at the rate of the lesser of 10 percent *per annum*, or at a rate *per annum* that is equal to one percent plus the prime rate as published by the Board of Governors of the Federal Reserve System in Statistical Release H.15, or any publication that may supersede it, on the date that the judgment is entered.

IT IS FURTHER ORDERED that the Commission shall disburse the restitution funds on a *pro rata* basis to the investors shown on the records of the Commission. Any restitution funds that the Commission cannot disburse to an investor because the investor is deceased or an entity which invested is disallowed, shall be dispersed on a *pro rata* basis to the remaining investors shown on the records of the Commission. Any remaining funds that the Commission determines it is unable to or cannot feasibly disburse shall be transferred to the general fund of the State of Arizona.

IT IS FURTHER ORDERED that, pursuant to A.R.S. § 44-2036, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law, Respondents Smith & Cox, LLC, William Andrew Smith, as his sole and separate obligation, and William Andrew Smith and Kimberly Ann Smith, as a community obligation, Christopher Spence Cox, as his sole and separate obligation, and Christopher Spence Cox and Beth Cox, as a community obligation, and Mark Corbett shall each pay to the State of Arizona administrative penalties in the amount of $105,000.00. Said administrative penalties shall be payable by either cashier's check or money order payable to "the State of Arizona" and presented to the Arizona Corporation Commission for deposit in the general fund for the State of Arizona.

IT IS FURTHER ORDERED that, pursuant to the authority granted to the Commission under A.R.S. § 44-3296, as a result of the conduct set forth in the Findings of Fact and Conclusions of Law, Respondents Smith & Cox, LLC, and William Andrew Smith, as his sole and separate obligation, and William Andrew Smith and Kimberly Ann Smith, as a community obligation, shall each pay administrative penalties in the principal amount of $21,000.00, payable to the Arizona Corporation Commission within 90 days of the effective date of this Decision. Said administrative penalties shall be payable by either cashier's check or money order payable to "the State of Arizona" and presented to the Arizona Corporation Commission for deposit in the general fund for the State of Arizona.

IT IS FURTHER ORDERED that the payment obligations for these administrative penalties

shall be subordinate to the restitution obligations ordered herein and shall become immediately due and payable only after restitution payments have been paid in full or upon Respondents' default with respect to Respondents' restitution obligations.

IT IS FURTHER ORDERED that if Respondents fail to pay the administrative penalties ordered hereinabove, any outstanding balance plus interest, at the rate of the lesser of ten percent *per annum* or at a rate *per annum* that is equal to one percent plus the prime rate as published by the Board of Governors of the Federal Reserve System in Statistical Release H.15, or any publication that may supersede it on the date that the judgment is entered, may be deemed in default and shall be immediately due and payable, without further notice.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-3201, Respondent William Andrew Smith's license as an investment adviser representative is revoked from the effective date of this Decision.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. § 44-3201, Respondent Smith & Cox, LLC's license as an investment adviser is revoked from the effective date of this Decision.

IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, any outstanding balance shall be in default and shall be immediately due and payable without notice or demand. The acceptance of any partial or late payment by the Commission is not a waiver of default by the Commission.

IT IS FURTHER ORDERED that default shall render Respondents liable to the Commission for its cost of collection and interest at the maximum legal rate.

IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, the Commission may bring further legal proceedings against the Respondents including application to the Superior Court for an order of contempt.

IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application, the Commission may grant a rehearing of this Order. The application must be received by the Commission at its offices within twenty (20) calendar days after entry of this Order. Unless otherwise ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant a rehearing

within twenty (20) calendar days after filing the application, the application is considered to be denied. No additional notice will be given of such denial.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN BURNS COMMISSIONER DUNN COMMISSIONER KENNEDY

COMMISSIONER OLSON COMMISSIONER MARQUEZ PETERSON

IN WITNESS WHEREOF, I, MATTHEW J. NEUBERT, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 2nd day of October 2020.

MATTHEW J. NEUBERT
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
BDS/ec(gb)

SERVICE LIST FOR: BAIC, INC., SOBELL CORP, ANDREW GAMBER, MARK CORBETT, UPSTATE LAW GROUP, LLC, CANDY KERN-FULLER, SMITH & COX, LLC, WILLIAM ANDREW SMITH & KIMBERLY ANN SMITH, CHRISTOPHER SPENCE COX.

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